Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE
QUESTION PRESENTED

I. Louisiana's capital punishment scheme relies upon appellate review to ensure that death sentences are not disproportionate to the penalty imposed in similar cases. In assessing whether Petitioner's sentence was excessive, the Louisiana Supreme Court did not examine similar first-degree murder cases that resulted in a life sentence, consider Petitioner's extensive mitigating circumstances, or assess her codefendant's relative culpability. The question presented is whether the operation of Louisiana's capital punishment scheme violates the Eighth Amendment's guarantee against arbitrariness in capital sentencing.

PARTIES TO THE PROCEEDING

The petitioner is Brandy Aileen Holmes, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandy Aileen Holmes respectfully petitions for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

OPINION BELOW

The Louisiana Supreme Court's opinion in *State v. Holmes,* authored by Justice Knoll, is reported at __ So. 2d __, 2008 La. Lexis 2758, and is reprinted in the Appendix at Pet. App. A. Chief Justice Calogero's dissent is reprinted at Pet. App. B. Justice Johnson's dissent is reprinted at Pet. App. C. The Louisiana Supreme Court's denial of rehearing is reprinted at Pet. App. D.

JURISDICTION

The Louisiana Supreme Court's opinion was entered on December 2, 2008. That court denied Ms. Holmes's timely petition for rehearing on January 30, 2009. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Article 905.3 of the Louisiana Code of Criminal Procedure provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, determines that the sentence of death should be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggra-

> vating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Article 905.4 of the Louisiana Code of Criminal Procedure provides in pertinent part:

> A. The following shall be considered aggravating circumstances:
>
> > (1) The offender was engaged in the perpetration or attempted perpetration of . . . armed robbery, first degree robbery, second degree robbery, simple robbery . . . .
> >
> > (4) The offender knowingly created a risk of death or great bodily harm to more than one person. . . .
> >
> > (10) The victim was . . . sixty-five years of age or older.

Article 905.5 of the Louisiana Code of Criminal Procedure provides in pertinent part:

> The following shall be considered mitigating circumstances: . . .
>
> > (b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

> (c) The offense was committed while the offender was under the influence or under the domination of another person; . . .
>
> (e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
>
> (f) The youth of the offender at the time of the offense;
>
> (g) The offender was a principal whose participation was relatively minor;
>
> (h) Any other relevant mitigating circumstance.

Article 905.9 of the Louisiana Code of Criminal Procedure provides:

> The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Louisiana Supreme Court Rule 28 provides, in pertinent part:

> Rule 905.9.1 Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)
>
> Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> . . .
>
> Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.
>
> (a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the

record a Uniform Capital Sentence Report . . . . The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire in to the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and other relevant matters concerning the defendant. . . .

(c) Defense counsel and the district attorney shall be furnished a copy of the complete Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds,

> the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. . . .

Section 4. Sentence Review Memoranda; Form; Time for Filing.

> (a) . . . the district attorney and defendant shall file sentence review memoranda addressed to the propriety of the sentence. . . .
>
> (b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include
>
> i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the

crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

STATEMENT

This petition presents the Court with the question of whether Louisiana's current administration of its death penalty scheme violates the Eighth Amendment's guarantee against arbitrariness in capital sentencing. The question centers on whether Louisiana's proportionality review – an important safeguard in the state's capital sentencing regime – fails in practice to guard against disproportionate death sentences.

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down (as contrary to the Eighth Amendment) the majority of states' death penalty statutes. "Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Four years later, in *Gregg*, the Court approved Georgia's reconstituted death penalty scheme. The *Gregg* Court noted with approval the

appellate review mechanism in the Georgia statute whereby the Georgia Supreme Court independently reviews "the appropriateness of imposing the sentence of death in the particular case." *Id.* at 166.

In *Pulley v. Harris*, 465 U.S. 37 (U.S. 1984), the Court held that the comparative proportionality review that Georgia provides is not "indispensable" to a constitutional death penalty scheme, while reaffirming the central holding of *Furman* that a death penalty scheme that is plagued by systemic inconsistencies is unconstitutional. 465 U.S. at 45. The Court clarified that it "take[s] statues as [it] find[s] them" and acknowledged the possibility that proportionality review might be constitutionally required if the state capital scheme failed to check against the arbitrary imposition of the death penalty. *Id.* at 51.

Following *Harris*, a majority of a sharply divided Louisiana Supreme Court concluded that the Eighth Amendment does not require proportionality review in Louisiana. *See State v. Welcome*, 458 So. 2d at 1252; *but see* 458 So. 2d at 1256 (Calogero, J., dissenting); *id.* at 1258 (Dixon, C.J., dissenting); *id.* at 1259 (Dennis, J., dissenting).

This term, in a separate statement concerning the denial of certiorari in *Walker v. Georgia*, 129 S. Ct. 453 (2008), Justice Stevens observed that the "likely result" of an incomplete proportionality review would be "the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment." 129 S. Ct. at 457. Justice Stevens observed that the Court's decision in *Gregg* "assumed that the [Georgia Supreme Court] would consider whether there were 'similarly situated defendants' who had not been put to death because

that inquiry is an essential part of any meaningful proportionality review" and depended in "part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality." *Id.*

Louisiana's current death penalty scheme is modeled after the Georgia scheme approved in *Gregg*.[1] It similarly relies on meaningful appellate review of each death sentence. *See* La. C. Cr. P. Art. 905.9 ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive.").[2] Though the Louisiana Supreme Court is required to review every death sentence to determine "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," that review, in practice, does not fulfill *Furman*'s command to eliminate arbitrariness.

The Louisiana Supreme Court's proportionality review in this case did not compare Petitioner's death sentence to other first-degree murder cases where a sentence of death was not imposed. Nor did that court's review consider the extensive mitigating

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[1] *See State v. Welcome*, 458 So. 2d 1235, 1251 (1984) (noting that after the Court voided Louisiana's first post-*Furman* capital sentencing scheme in *Roberts v. Louisiana*, 428 U.S. 325 (1976), the state legislature "set forth a new capital sentencing procedure that essentially followed the Georgia procedure approved in *Gregg*.").

[2] Louisiana Supreme Court Rule 28 provides for review that closely tracks Georgia's process, except the Georgia legislature has provided for an assistant and necessary staff to monitor all capital cases – a provision not observed in Louisiana. *See* Ga. Code Ann. §17-10-37.

circumstances that limited Ms. Holmes's moral culpability and compare them to the mitigating circumstances presented in similar cases. The court also failed to consider that Petitioner's co-defendant received a death sentence and that the prosecutor stated at the codefendant's trial that he (and not the Petitioner) was the more culpable party. In sum, the appellate review conducted in this case wholly failed to assure the proportionality of Ms. Holmes's death sentence.

Louisiana's inadequate proportionality review is not limited to this case. The Louisiana Supreme Court regularly fails to compare death sentences with other first-degree murder convictions where the jury imposed a life-sentence. Even the limited pool of cases that court does use as a basis of comparison is often incomplete or inaccurate. *See infra* Reasons for Granting the Writ II(C). In any event, the proof of the pudding is in the eating: the Louisiana Supreme Court has only ever reversed one death sentence for excessiveness. *See State v. Sonnier*, 380 So. 2d 1 (La. 1979). That court has not found a single sentence to be excessive in the last twenty-five years despite having reviewed at least 200 capital cases.

The Court last evaluated Louisiana's capital sentencing scheme over 20 years ago, and has never considered whether the federal constitution compels Louisiana's proportionality review. *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Post-*Lowenfield* changes to Louisiana law increase the potential for arbitrariness. For example, Louisiana has drastically expanded the number of statutory aggravating circumstances, and simultaneously reduced restrictions on the types of State evidence that the jury may consider in making the death-determination.

These changes counter the *Furman* mandate because they expand (rather than narrow) the class of eligible offenders, and loosen the reins on (rather than channel) the sentencer's discretion. Consequently, the Louisiana Supreme Court is under more constitutional pressure to carefully conduct proportionality review to ensure the ultimate sentence is neither wantonly nor freakishly imposed.

FACTUAL BACKGROUND

A Caddo Parish Grand Jury indicted Petitioner, along with co-defendant Robert Coleman, on February 14, 2003 for the first-degree murder of Julian Brandon.[3] Petitioner conceded responsibility, but insisted that her crime constituted second –rather than first – degree murder. *See* Pet. App. A. at 2a n.2.

Significant evidence supported Ms. Holmes's diminished culpability. *See* Pet. App. C. (Johnson, J., dissenting); Pet. App. B. at 133a (Calogero, C.J., dissenting) (finding the "evidence regarding the defendant's mental retardation is sufficient, i.e., that there is a reasonable likelihood that she is mentally retarded . . . ."). Moreover, Ms. Holmes defended against the death penalty by presenting evidence that she suffered from global brain damage and Fetal Alcohol Syndrome (FAS). Further testimony established that Petitioner's structural brain damage impaired her decision-making processes and ultimately rendered her less culpable for the crime. *See infra* Reasons for Granting the Writ II(B).

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[3] Mr. Brandon's wife, Alice Brandon, survived a gunshot wound to the head. Pet. App. A. at 5a.

Petitioner's "mother testified that she drank whiskey during the first three months of her pregnancy and [] afterwards switched to beer. She told the jury she named the defendant Brandy because that was the drink she liked." Pet. App. A at 9a. As a toddler, Brandy began compulsively ingesting pebbles and gravel. This condition, known as pica, is associated with brain damage. In her case, the pica was so severe that she required oral surgery to her teeth and gums at the age of three. Appellant's Sentence Review Memorandum at 7.

When she entered school, Brandy was diagnosed with global learning disabilities in the areas of reading, math, and communication. Her problems included speech impairment and difficulties with both "visual and auditory processing and visual-motor integration." *Id.* at 5. She was placed in special education classes. Despite early intervention at school, Brandy never progressed beyond functioning at an age-equivalent of 10-12. *Id.*

Throughout her childhood, Brandy's divorced parents shipped her back-and-forth between Mississippi and Louisiana. Both family environments were characterized by alcoholism, violence, and a complete failure to provide structure, safety and security to a severely impaired young girl. *Id.* at 7.

At the age of 12, Brandy refused to eat for two days in an attempt to starve herself to death after she was raped by her sister's boyfriend.[4] She was then committed to a psychiatric hospital in Missis-

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[4] The prosecution contended that Brandy's rape at age 12 by her sister's 16 year-old boyfriend was "consensual" sex. R. 6101.

sippi. *Id.* at 6. At that point, she was first diagnosed with Post Traumatic Stress Disorder and Major Depression, diagnoses that remained accurate from 1992 through a pretrial court-ordered expert evaluation performed in 2005. *Id.*

As she entered adolescence, evidence of Brandy's brain dysfunction, the trauma and neglect she endured in her parents' homes, and her borderline mentally retarded intellectual functioning manifested itself in increasingly destructive behaviors. These behaviors included truancy, running away from home and group homes, carrying knives to school for self-protection, destruction of property, theft, and unauthorized entry of an inhabited dwelling. *Id.* at 7. At the age of 13, the juvenile court removed Brandy from her mother's home because her mother was unable to respond to her needs. She was then placed in a succession of group homes. *Id.* At age 15, Brandy was sentenced to juvenile prison until the age of 21 for unauthorized entry of a dwelling. *Id.* at 8.

Several months before the commission of the instant crime, Ms. Holmes began dating Robert Coleman, her codefendant in this capital murder case.[5] Coleman was ten years older and suffered from none of Ms. Holmes's debilitating impairments. The psychiatrist who examined Petitioner and conducted pre-trial interviews with her family members testified that Ms. Holmes did whatever Coleman told

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[5] The Louisiana Supreme Court overturned Robert Coleman's conviction because the State discriminated on the basis of race in jury selection. *See State v. Coleman*, 970 So. 2d 511 (La. 2007). Coleman currently awaits re-trial.

her to do. He physically abused her and controlled her behavior. *Id.* at 9.

In both the guilt and penalty phases, the trial court precluded Ms. Holmes from introducing evidence "revealing that Coleman had been convicted of first-degree murder and sentenced to death." Pet. App. A at 32a. Ms. Holmes presented other evidence that suggested her codefendant was the major participant in the homicide, and that she acted under his domination. Appellant's Sentence Review Memorandum at 9-10.

The State submitted three aggravating circumstances. The jury found: (1) the offender was engaged in the perpetration or attempted perpetration of an armed robbery, first-degree robbery or simple robbery; (2) the offender knowingly created a risk of death or great bodily harm to more than one person; and (3) the victim was 65 years of age or older. *See* La. C. Cr. Proc. art. 905.4(A) (1), (4), (10).

At the penalty phase, the defense offered evidence that Petitioner's case implicated at least six of Louisiana's statutory mitigating circumstances. In addition to the "any other relevant mitigating circumstance" catch-all, La. C. Cr. P. art. 905.5 (h), evidence indicated that: the offense was committed while under emotional and mental disturbance; the offense was committed while under the domination of another person; at the time of the offense the offender's ability to appreciate the criminality of her conduct or conform it to the law was impaired as a result of mental defect; the offender was young at the time the crime was committed; and the offender's participation was relatively minor. La. C. Cr. P. art. 905.5 (b), (c), (e), (f), (g).

The jury returned a death verdict. On appeal, Petitioner challenged under the Eighth Amendment the sufficiency of Louisiana's proportionality review. She argued that "[a]n adequate capital sentence review cannot be performed without consideration of both mitigating and aggravating circumstances" and that the Louisiana Supreme Court must review "cases where the death penalty was returned, but also those in which it was not." Appellant's Capital Sentence Review Memorandum at 2, 17.

The Louisiana Supreme Court affirmed Petitioner's conviction and death sentence, specifically finding that "it cannot be said the death penalty in this case is disproportionate." Pet. App. A at 113a. The Louisiana Supreme Court's proportionality review was limited to references to other cases in which death sentences were returned for the same or similar aggravating circumstances that the jury found in Ms. Holmes's case. The court listed a series of cases in which juries imposed the death penalty for crimes committed in the home,[6] for crimes in

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[6] The court observed that "juries appear especially prone to impose capital punishment for crimes committed in the home." Pet. App. A at 110a. This observation demonstrates the problem with failing to compare death sentences to life sentences: without knowing the universe of cases of crimes committed in the home, it is impossible to know whether juries are "especially prone to impose capital punishment for crimes." If there were only 20 death-eligible crimes committed within the home and all of them resulted in death sentences, the court would reach a very different conclusion than if there were 500 death-eligible crimes committed within the home and only 20 resulted in death sentences. *See, e.g., Enmund v. Florida,* 458 U.S. 782, 818-19 (1982) (O'Connor, J., dissenting) (explaining the problem in the felony murder context with statistics that "do not reveal the number or fraction of homicides that were charged" or "the number or fraction of cases in which the State

which the defendant created a risk of death or great harm to more than one person, and for crimes in which the victims were over the age of 65. Based on this observation alone – that the Louisiana juries have previously imposed the death penalty for the same aggravating factors which were found to be present in Ms. Holmes's case – the court concluded that her death sentence was proportionate.

The Louisiana Supreme Court did not compare Petitioner's death sentence to other first-degree murder cases where death sentences were not imposed. That court also did not compare mitigating evidence across cases when it determined that Petitioner's death sentence is proportionate. Nor did the court do as it had promised and assess Petitioner's diminished culpability compared to her older, larger, and more domineering co-defendant. *See* Pet. App. A. at 44a ("[T]he Legislature did not intend to require a detailed comparative analysis of other first degree murder cases and sentences by the jury in a capital sentence hearing," because "the function of comparative analysis falls to this Court as part of its Rule 28 [proportionality] review of capital sentences." (internal quotation and citations omitted)).

In her application for rehearing, Petitioner, noting Justice Stevens's statement concerning the denial of certiorari in *Walker*, argued that the Louisiana Supreme Court's "minimal review cannot detect excessive sentences of death and ensure against the arbitrary or discriminatory imposition of death . . . . [T]his Court erroneously affirm[ed] Ms.

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sought the death penalty" because "[c]onsequently, we cannot know the fraction of cases in which juries rejected the death penalty.").

Holmes' unconstitutionally excessive sentence of death." Appellant's Application for Rehearing at 3. The Louisiana Supreme Court denied Petitioner's timely application for a rehearing on January 30, 2009. This petition ensues.

REASONS FOR GRANTING THE WRIT

The Eighth Amendment limits imposition of the death penalty to "those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (internal citations omitted). State sentencing statutes must meaningfully sort the many murderers who do not receive a death sentence from the very few who do. *See Gregg*, 428 U.S. at 188 ("*Furman* held that [capital punishment] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

The quality of Louisiana's proportionality review is central to the constitutionality of its death penalty scheme. Inadequate proportionality review fails to ensure that death sentences in Louisiana comply with the Eighth Amendment's guarantee against arbitrary death sentences. The Louisiana Supreme Court's proportionality review of Petitioner's death sentence could not plausibly measure whether her sentence is excessive: that court did not consider cases where a person convicted of first degree murder received a life sentence, or even compare mitigating factors in its excessiveness analysis.

This Court should grant review to consider whether the United States Constitution requires Louisiana's proportionality review. The Court should also address whether the review conducted in this case was so inadequate as to unconstitutionally increase the risk of an arbitrary death sentence. This issue is well-preserved, and there are no vehicle impediments to this Court's review of the case.

I. The Eighth Amendment Requires Louisiana to Engage in Proportionality Review.

This Court's decision in *Harris* is not a reason to deny *certiorari* here.[7] "[T]he Eighth Amendment

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[7] Indeed, *Harris* reiterated the *Gregg* Court's maxim that "each distinct system must be examined on an individual basis." 465 U.S. at 45. Moreover, since *Harris*, numerous commentators have called for proportionality review as a means to achieve the consistency and fairness that continues to elude capital punishment schemes. *See, e.g.*, David Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp (1987): *Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 176 (2007) (praising New Jersey's extensive proportionality review for helping to reduce arbitrariness and discrimination in its administration of the death penalty); Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883, 887-88 (2002) (explaining the need for proportionality review that considers as evidence of the violation of evolving standards of decency the better treatment of similar defendants); THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY (2001), *available at* http://www.constitutionproject.org/detail.asp?id=2 (last visited March 23, 2009) at 27 ("Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and

cannot tolerate the infliction of a death sentence under a legal system that permits this unique penalty to be wantonly and freakishly imposed." *Walker*, 129 S. Ct. at 454 (Statement of Stevens, J., respecting the denial of the petition for writ of certiorari) (citing *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)). Louisiana, unlike California, employs a "capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." *Harris*, 465 U.S. at 51.

The sheer number of individuals who may receive a death sentence directly relates to the risk of arbitrariness. When the Court decided *Lowenfield*, the Louisiana statute contained five aggravating factors at the guilt phase and nine aggravating factors at the penalty phase. *See* 484 U.S. at 241-42 & 243 n.6. Subsequently, the state legislature added four aggravating factors at the guilt stage and three additional aggravating circums-

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to prevent discrimination from playing a role in the capital decision-making process"); Ken Driggs, *The Most Aggravated and Least Mitigated Murders: Capital Proportionality Review in Florida*, 11 ST. THOMAS L. REV. 207, 272 (1999) (describing proportionality review as a successful tool in Florida for reducing the arbitrary and discriminatory nature of the death penalty); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U.COLO. L. REV. 813, 819 (1999) (arguing that state courts must use meaningful proportionality review to ensure constitutionally required fairness in capital sentencing); Lawrence Lustberg & Lenora Lapidus, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 SETON HALL L. REV. 1423, 1428 (1996) (demonstrating that "meaningful proportionality review is necessary to ensure the very fairness, even-handedness and egalitarian application of the most severe sanction available in this or any other society").

tances at the penalty phase. *See* La. R.S. § 14:30; La. C. Cr. P. art. 905.4 (A). The upshot is that far more individuals are eligible for a possible death sentence today than when this Court last validated the Louisiana capital sentencing scheme.

In addition to the post-*Lowenfield* widening of the net of offenders eligible for a possible death sentence, the Louisiana sentencing scheme further increases the risk of arbitrariness because it contains few internal controls to guide jury discretion. For example, while many state statutes harness the jury's discretion by requiring jurors to weigh mitigating evidence against aggravating evidence, the Louisiana sentencing scheme "does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard." *State v. Anderson*, 996 So. 2d 973, 1015 (La. 2008). Nor does the Louisiana scheme impose a standard of proof upon the jury's determination that death should be imposed. *See id.*

The Louisiana Supreme Court has also vastly expanded the type of evidence the State can introduce for the jury's consideration at the penalty phase. *See State v. Jackson*, 608 So. 2d 949 (La. 1992) (permitting evidence of un-adjudicated other offense evidence); *State v. Bernard*, 608 So. 2d 966 (La. 1992) (permitting victim impact evidence); *State v. Sepulvado*, 672 So. 2d 158 (La. 1996) (holding that admissible bad character evidence includes verbal and non-criminal information).[8] In-

[8] Procedural bars may also increase the amount of prejudicial evidence heard by a capital jury. *See State v. Taylor*, 669 So. 2d 364 (La. 1996) (applying procedural bar to unob-

creased access to such aggravating information has expanded – rather than channeled – jury discretion. This amplified discretion heightens the risk of arbitrary sentencing.

In light of Louisiana's current capital punishment scheme, proportionality review necessarily plays a vital role in stamping out the risk of arbitrariness and discrimination in capital sentencing. *See Gregg*, 428 U.S. at 205 ("In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."); *id.* at 207 ("the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.").

In a State where the death penalty's imposition looks more and more like what this Court saw in *Furman*, the need for meaningful proportionality review is clear. Despite this heightened need to ensure that death sentences are not arbitrary or excessive, the Louisiana Supreme Court's proportionality review remains deficient.

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jected to guilt phase error); *State v. Wessinger*, 736 So. 2d 162 (La. 1999) (applying procedural bar to unobjected to penalty phase error).

II. The Louisiana Supreme Court Conducted a Constitutionally Insufficient Proportionality Review in this Case.

A. The Louisiana Supreme Court did not compare Petitioner's death sentence with other first-degree murder cases where a life sentence was imposed.

In *Zant v. Stephens*, the Court upheld the current iteration of Georgia's capital sentencing scheme after relying (in part) on the Georgia Supreme Court's representation that its proportionality review "uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed." 462 U.S. 862, 880 n.19 (1983); *see also Gregg*, 428 U.S. at 205 n.56. As Justice Stevens recently observed, "[t]hat approach seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Walker*, 129 S. Ct. at 454-55.

Simply comparing cases in which the death penalty has been imposed does not constitute meaningful proportionality review "because without knowledge of the life-sentenced cases, a court would be unable to determine whether there is a 'meaningful basis' for distinguishing the death sentences it reviews from the 'many cases' in which lesser sentences are imposed." *In re Proportionality Review Project*, 161 N.J. 71, 84 (N.J. 1999) (internal citations omitted). "The [court's] failure to acknowledge . . . any other cases outside the limited universe of cases in which the defendant was sentenced to death

creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations." *Walker*, 129 S. Ct. at 456.

Many Louisiana first-degree murder cases with aggravating circumstances similar to those the jury found here resulted in life sentences. Juries have imposed life sentences in a plethora of cases involving crimes committed in the home.[9] Juries have also frequently sentenced to life individuals convicted of creating the risk of death or great bodily harm to more than one person.[10] And, several cases

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[9] *See, e.g.*, *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Donaldson*, 391 So. 2d 1182 (La. 1980); *State v. Wiley*, 513 So. 2d 849 (La. App. 2 Cir. 1987); *State v. Edwards*, 406 So. 2d 1331 (La. 1981); *State v. Medford*, 489 So. 2d 957 (La. App. 5 Cir. 1986); *State v. McCullough*, 774 So. 2d 1105 (La. App. 3 Cir. 2000); *State v. Kevin Manieri*, 378 So. 2d 931 (La. 1979); *State v. Sheldon Manieri*, 378 So. 2d 931 (La. 1979); *State v. Deboue*, 496 So. 2d 394 (La. App. 4 Cir. 1986); *State v. Thibodeaux*, 728 So. 2d 416 (La. App. 3 Cir. 1998); *State v. Robinson*, 421 So. 2d 229 (La. 1982) (life sentence after new sentencing hearing); *State v. Ledet*, 792 So. 2d 160 (La.App. 5 Cir. 2001); *State v. Vasquez*, 729 So. 2d 65 (La. App. 5 Cir, 1999); *State v. Cedrington*, 725 So. 2d 565 (La. App. 5 Cir. 1998); *State v. Johnson*, 725 So. 2d 565 (La. App. 5 Cir. 1998); *State v. Bibb*, 626 So. 2d 913 (La. App. 5 Cir. 1993).

[10] *See State v. Gilliam*, 827 So. 2d 508 (La. App. 2 Cir. 2002); *State v. Smith*, 740 So. 2d 675 (La. App. 2 Cir 1999), writ denied, 785 So. 2d 840 (La. 2001); *State v. Williamson*, 671 So. 2d 1208 (La. App. 2 Cir. 1996), writ denied, 679 So. 2d 1380 (La. 1996); *State v. Johnson*, 665 So. 2d 1237 (La. App. 2 Cir. 1995); *State v. Foy*, 439 So. 2d 433 (La. 1983); *State v. Forbes*, 362 So. 2d 1385 (La. 1978); *State v. Stanfield*, 562 So. 2d 969 (La. App 3 Cir. 1990); *State v. Lormand*, 771 So. 2d 734 (La. App. 3 Cir. 2000); *State v. Brown*, 715 So. 2d 566 (La. App. 3 Cir. 1998); *State v. Baudoin*, St. Martin Parish District Court Docket No. 97-181960 (1997); *State v. Wilson*, 631 So. 2d 1213 (La.App. 5 Cir. 1994); *State v. Williams*, 871 So. 2d 599 (La.

involving elderly victims have resulted in a life sentence.[11] The Louisiana Supreme Court's cursory proportionality review is silent on the import and relevance of all these life-sentence cases.

B. The Louisiana Supreme Court's proportionality review failed to consider mitigating circumstances to determine whether Petitioner's death sentence is appropriate.

Despite the extensive mitigating circumstances presented in this case, the Louisiana Supreme Court made *no* effort to compare the mitigation presented by Ms. Holmes to that offered in other capital cases.

App. 5 Cir. 2004); *State v. Harris*, 871 So. 2d 599 (La. App. 5 Cir. 2004); *State v. Medford*, 489 So. 2d 957 (La. App. 5 Cir. 1986); *State v. Deboue*, 496 So. 2d 394 (La. App. 4 Cir. 1986); *State v. Butler*, 462 So. 2d 1280 (La. App. 5 Cir. 1985); *State v. Thibodeaux*, 728 So. 2d 416 (La. App. 3 Cir. 1998); *State v. Dean*, 487 So. 2d 709 (La. App. 5 Cir. 1986), writ denied, 495 So.2d 300 (La. 1986); *State v. Coleman*, 756 So. 2d 1218 (La. App. 2 Cir. 2000); *State v. Vince*, 739 So. 2d 308 (La. App. 1 Cir. 1999) (jury deadlock resulted in life sentence); *State v. Shawn Smith*, 717 So. 2d 1209 (La. App. 4 Cir. 1998); *State v. Kendrick Howard*, 717 So. 2d 1209 (La. App. 4 Cir. 1998); *State v. Guillory*, 715 So. 2d 400 (La. App. 3 Cir. 1998); *State v. Rodriguez*, 822 So. 2d 121 (La. App. 1 Cir. 2002); *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Moore*, 412 So.2d 108 (La. 1982); *State v. Bibb*, 626 So. 2d 913 (La. App. 5 Cir. 1993); *State v. Pascual*, 735 So. 2d 98 (La. App. 5 Cir, 1999).

[11] *See State v. Donaldson*, 391 So. 2d 1182 (La. 1980); *State v . Edwards*, 406 So.2d 1331 (La. 1981); *State v. Odom*, 760 So. 2d 576 (La. App. 2 Cir. 2000); *State v. Riggins*, 388 So. 2d 1164 (La. 1980); *State v. Ledet*, 792 So. 2d 160 (La. App. 5 Cir. 2001); *State v. Ross*, 572 So. 2d 238 (La. App. 1 Cir. 1990).

Petitioner's case presents compelling mitigating evidence. Prior to trial and at trial, a psychiatrist testified that Ms. Holmes suffers from Fetal Alcohol Syndrome (FAS), a condition created by her mother's alcohol consumption during pregnancy. A psychologist testified that neuropsychological testing revealed Ms. Holmes has long-suffered from a moderate degree of organic brain dysfunction, primarily to the left side of her brain. The expert testified – uncontested by the state – that the specific impairment to Brandy's brain negatively impacts her ability to reason, foresee consequences, communicate, abstract and learn from experiences, control impulses, read verbal cues, and accurately interpret the reactions of others. Appellant's Sentence Review Memorandum at 4.

Further uncontested testimony established that pre-trial MRI and PET scans revealed significant abnormalities in several areas of Brandy's brain, including: the amygdala, bilateral inferior temporal regions, superior temporal areas along the sylvian fissure, bilateral parietal regions, left medial temporal area, right putamen/globus pallidus, bilateral cerebellum frontal regions. *Id.* at 4-5.

The record further establishes – particularly in light of codefendant Coleman's physical and emotional domination – real questions about the level of Petitioner's participation in the crime. The only evidence placing Ms. Holmes at the scene of the murder is her contradictory and unreliable statements to police. The physical evidence placed Coleman, not Ms. Holmes, at the scene of the crime. Even the Assistant District Attorney who prosecuted this capital case expressed concern as to the level of Ms. Holmes's involvement in the murder for which she

has been convicted and sentenced to death.[12] Appellant's Sentence Review Memorandum at 9.

C. The Louisiana Supreme Court Regularly Conducts Inadequate Proportionality Review.

The Louisiana Supreme Court's proportionality review routinely fails to compare the death sentence at issue with similar first-degree murder convictions where the jury imposed a life sentence. *See, e.g.*, *Anderson*, 996 So. 2d 973, 1018-20; *State v. Legrand*, 864 So. 2d 89, 104-07 (La. 2003); *cf. Walker*, 129 S. Ct. at 455-56 ("Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment."). Nor does that court consider the factors that determine which defendants are the most culpable for their crimes. *See, e.g.*, *State v. Lacaze*, 824 So. 2d 1063, 1085 (La. 2002).[13] The latter is especially important where, in

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[12] Mr. Holland related that he believes Holmes's personality is one that would exhibit tendencies to cover for and/or make excuses for an individual that she cared for, namely Robert Coleman. While speaking with a female detective in one interview, Holmes asked the detective if she had ever loved someone so much that she would do anything in the world for him. The detective then asked if the subject was referring to Robert Coleman, and Holmes replied that she was. Appellant's Sentence Review Memorandum at 9.

[13] *Cf. State v. Thompson*, No. E2005-01790-CCA-R3-DD (Tenn. Crim. App. April 25, 2007) (reversing death sentence of defendant with "long and documented history of mental illness" under proportionality review after comparative review of all

cases such as this one, the defendant's diminished culpability could have been overlooked by – or poorly presented to – the jury. A jury may see maladaptive behaviors as aggravating – rather than mitigating – circumstances. *Cf. Atkins v. Virginia*, 536 U.S. 304, 320 (2004) ("The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' is enhanced . . . by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." (internal citations omitted)).[14]

The Louisiana Supreme Court's proportionality review also regularly relies on cases that have required sentencing relief, been overturned or reversed, or where the defendant has been exonerated. *See* Pet. App. A at 110a-113a (citing to *State v. Bridgewater*, 823 So. 2d 877 (La. 2002) (defendant under age 18 at time crime was committed); *State v.*

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cases involving similar defendants and similar crimes); *State v. Kemmerlin*, 573 S.E. 2d 870 (N.C. 2002) (setting aside death sentence as disproportionate under totality of circumstances, including weak evidence in aggravation and presence of six mitigating factors); *State v. Papavvasas*, 170 N.J. 462 (N.J.2002) (setting aside defendant's death sentence under comparative proportionality review based comparison of mitigating and aggravating factors of defendant and those defendants in the appropriate comparison group).

[14] *See id.* ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)] demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." (internal citations omitted)).

Jacobs, 789 So. 2d 1280 (La. 2001) (reversed); *State v. Burrell*, 561 So. 2d 692 (La. 1990) (charges dismissed); *State v. Sanders*, 648 So. 2d 1272 (La. 1994) (death sentence vacated and remanded for new sentencing hearing); *State v. Deboue*, 552 So. 2d 355 (La. 1989) (cannot be executed under *Atkins*); *State v. Scott*, 921 So. 2d 904 (La. 2006) (sentence not yet affirmed)); *Anderson*, 996 So. 2d 973 (citing to *Burrell*, 561 So.2d 692 (above); *State v. Thompson*, 516 So. 2d 349 (La. 1987) (exonerated); *Bridgewater*, 823 So. 2d 877 (above); *Jacobs*, 789 So. 2d 1280 (above); *State v. Howard*, 751 So. 2d 783 (La. 1999) (defendant under age 18 at time crime was committed); *State v. Summit*, 454 So. 2d 1100 (La. 1984)).

Furthermore, the Louisiana Supreme Court's proportionality review is arbitrary in its geographic scope. That court employs an inter-district review in only some cases, without a consistently-articulated justification for the inconsistency. *See, e.g.*, Pet. App. A at 110a; *State v. Robinson*, 874 So. 2d 66, 89 (La. 2004); *State v. Weary*, 931 So. 2d 297, 325-26 (La. 2006); *State v. Davis*, 637 So. 2d 1012. 1031 (La. 1994). Louisiana's review also fails to consider the introduction of invidious factors such as the race of the defendant and victim or other arbitrary factors such as the judicial district in which the case arose.

Importantly, the Louisiana Supreme Court does not enforce the rules necessary to enable it to conduct meaningful proportionality review. *See* La. S. Ct. R. 28. Here, for example, the State did not come close to providing a complete list of first-degree murder cases where a sentence was imposed. *See* La. S. Ct. R. 28(4)(b)(i) (requiring the State to produce "a list of each first degree murder case in the district in which sentence was imposed after January 1,

1976.").[15] Nor did the State provide a complete accounting of mitigating circumstances in the first-degree murder cases that it did list. *See* La. S. Ct. R. 28(4)(b)(ii) (requiring the district attorney to file a memorandum that includes "a synopsis of the facts in the record concerning the crime and the defendant in the instant case."). Without this critical information, the Louisiana Supreme Court simply cannot provide any capital defendant the check against arbitrariness required by the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[15] "The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant." *Id.*

Respectfully submitted,

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Dated: April 30, 2009

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APPENDIX A

SUPREME COURT OF LOUISIANA

No. 06-KA-2988

STATE OF LOUISIANA

vs.

BRANDY AILEEN HOLMES

On Appeal from the
First Judicial District Court,
For the Parish of Caddo,
Honorable Scott J. Crichton, Judge

KNOLL, Justice.

On February 14, 2003, a Caddo Parish grand jury indicted Brandy Aileen Holmes ("defendant") for the first-degree murder of Julian L. Brandon, Jr.[1] On February 14, 2006, a unanimous jury found the defendant guilty as charged.[2] On February 16, 2006, the jury unanimously determined that defendant be

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[1] The grand jury also charged the defendant with the attempted first-degree murder of his wife, Alice Brandon. The court minutes of February 11, 2006, show the State dismissed Count 2 of the indictment which charged the defendant with the attempted first-degree murder of Alice Brandon.

[2] From the outset, we note defense counsel conceded the defendant was guilty of second-degree murder. After considering the evidence outlined infra, the jury found the State proved otherwise.

sentenced to death, finding all three aggravating circumstances urged by the State, specifically that: (1) the defendant was engaged in the perpetration or attempted perpetration of an armed robbery, first-degree robbery and simple robbery; (2) the defendant knowingly created a risk of death or great bodily harm to more than one person; and (3) the victim was 65 years of age or older.

This is a direct appeal under La. Const. art. V, § 5(D) by the defendant. Defendant appeals her conviction and sentence raising 45 assignments of error, variously combined into seventeen (17) arguments, with numerous assignments remaining not argued. We will address the most significant of these assignments of error in this opinion, and the remaining assignments of error will be addressed in an unpublished appendix. After a thorough review of the law and the evidence, for the following reasons we affirm the defendant's first-degree murder conviction and the imposition of the death sentence.

FACTS

During the early evening hours of January 1, 2003, the defendant and her boyfriend, Robert Coleman,[3] forced their way into the rural home of

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[3] On February 17, 2005, a jury unanimously returned a verdict of guilty against Robert Coleman, finding he committed the first-degree murder of Reverend Brandon. The jury also returned a death verdict against him, finding all four aggravating circumstances the State urged. Nevertheless, on November 2, 2007, a majority of this Court reversed Coleman's conviction and sentence, finding the State's proffered reason for the exercise of its peremptory challenge against an African-American prospective juror was not facially neutral and thus violated the equal protection clause. State v. Coleman, 06-0518 (La. 11/2/07), 970 So. 2d 511. Accordingly, we reversed

Julian Brandon, a retired minister who was 70 years of age, and his wife Alice, who was 68 years of age. Reverend Brandon was shot at near contact range in the underside of his jaw with a .380 caliber handgun. The bullet separated into two pieces: one fragment entered the victim's brain; the other exited the top of his head and was later recovered from the dining room ceiling, adjacent to the front entryway. Julian Brandon immediately collapsed.

Defendant and Coleman then took Mrs. Brandon to the rear bedroom of the residence and demanded her valuables, cash, and credit cards as she begged for her life. The defendants subsequently placed a pillow over Mrs. Brandon's face, shot her in the head, and left her for dead. After shooting Mrs. Brandon, defendant and Coleman heard Reverend Brandon struggling with his wounds. After retrieving three Chicago Cutlery knives from the kitchen, they stabbed and slashed him to death. They inflicted slashing cuts to Reverend Brandon's nose and face and stabbing wounds on the top and rear of his head and chest. One of the knives struck Reverend Brandon's head with such force, it shattered and pieces of the knife were found strewn about the crime scene. The offenders cut Reverend Brandon's throat several times – two large cutting wounds went around the entire neck, severing the carotid artery and jugular vein. Six stab wounds, some wounds penetrating as deep as six inches, were also identified in Reverend Brandon's left upper chest; these wounds went into the chest cavity and involved the heart and lungs resulting in internal bleeding. Another stab wound was found on the right side of the chest; this wound involved the abdomen

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Coleman's conviction and sentence, and remanded the case to the trial court for a new trial. Id. at 517.

and liver. In addition, a six-inch knife was found imbedded up to the handle in Reverend Brandon's back.

On January 5, 2003, four days after the attack by defendant and Coleman, Calvin Barrett Hudson, a family friend of the Brandons, became concerned when the couple did not attend church on Sunday and decided to check on them. When he and his wife went to their friends' residence, they found Reverend Brandon lying in a pool of his blood on the carpet. Hudson immediately went to a neighbor's house and called the sheriff's office.

When the police responded to the call, they found Reverend Brandon's body. It was not until the authorities checked the house that they discovered Mrs. Brandon was barely alive. After the police summoned emergency medical personnel, a medical helicopter was called to transport Mrs. Brandon to the hospital. Even though Mrs. Brandon received a gunshot wound to the head, she survived the attack; at the time of trial, she remained permanently disabled and requires around-the-clock care.

After the television news reported the crime, the Caddo Parish Sheriff's Office received a tip from persons at an apartment complex near the crime scene. The callers indicated the defendant had been bragging about killing an elderly couple down the road near a church and that she was trying to sell their jewelry. Detectives then went to the trailer of Brenda Bruce, defendant's mother, which was located near the homicide scene. There they located defendant, Coleman, her mother, and defendant's 15-year-old brother, Sean George. All four agreed to accompany the officers to the sheriff's office for interviews.

Over the next two days and after being Mirandized numerous times, the defendant made six

recorded and unrecorded statements, implicating herself and others to varying degrees in the homicide and robbery; in only the first statement did the defendant deny involvement in the murder of Reverend Brandon. In one of the interviews, defendant claimed she was the shooter in both the murder of Reverend Brandon and the attempted murder of his wife. Defendant further revealed that two days after the violent entry into the Brando[n] home, she and two of her young nephews bicycled to the Brandons' residence; only the youngest nephew, nine years of age, entered the residence with her. Defendant stated she went back to the house because she dreamed the woman was still alive; even though she heard Mrs. Brandon's heavy breathing, she just left the residence. The nine-year-old nephew entered the home with his aunt, where he observed Reverend Brandon lying in a pool of blood and heard Mrs. Brandon screaming from another room in the home.[4] A neighbor witnessed both nephews fleeing from the residence, leaving the defendant inside the home.

In addition to several statements the defendant made in which she admitted involvement in the violent entry into the Brandon home and murder, police recovered considerable circumstantial evidence demonstrating her participation. Although the gun used in the shootings was not recovered, ballistics evidence demonstrated that the weapon used in the Brandon homicide was the same weapon

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[4] At trial, Demetrius Clemens, the defendant's nephew who was nine years of age, identified a videotaped interview in which he discussed entering the Brandon residence with defendant. The videotape itself, exh. 120, is not included in the record provided to us, but is on file at the Caddo Parish Clerk of Court's office.

that had belonged to defendant's father and had been stolen from his residence in Tylertown, Mississippi; this theft occurred immediately before defendant and Coleman traveled from Mississippi to Shreveport on Christmas Eve 2002.[5] In one of her statements to the police, the defendant admitted she had stolen her father's .380 handgun while visiting him in Mississippi. In addition, a surveillance video from Hibernia Bank depicted the defendant and Coleman attempting to use the Brandons' credit card at an ATM.

A search of the Bruce trailer where the defendant and Coleman were staying led to the discovery of several incriminating items. A multi-colored bracelet found in a clear plastic food service glove was recovered from the rain gutter of the trailer where the defendant stayed; Mrs. Brandon's daughter identified the multi-colored bracelet as one she had given her mother some time earlier. A box of food service gloves recovered from the bedroom that defendant shared with Coleman had a diamond pattern consistent with blood transfer stains observed at the crime scene. Three fired .380 cartridge casings were also found in the rain gutter of the trailer. Laboratory analysis revealed that Reverend Brandon's DNA was found on one of these casings. Additionally, forensic analysis matched the .380 projectile recovered from Reverend Brandon's brain and the dining room ceiling to a projectile recovered from a tree at the home of defendant's

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[5] The investigation showed a close link between the defendant and Coleman. On Christmas Eve 2002, the defendant and Coleman traveled from defendant's father's home in Mississippi to Shreveport. The defendant's mother picked them up and brought them to her trailer while the couple was in Shreveport.

father in Mississippi; defendant's father had fired the gun into a tree on his property before the gun was stolen.

At the penalty phase, in addition to victim-impact evidence from the Brandons' two daughters, the State introduced evidence that defendant had attempted another violent home entry days before the charged offense in a gated community known as "Nob Hill." As a result of one of the defendant's admissions during investigation, it became known the defendant participated in the homicide of Terrance Blaze days after the Brandons were shot. Regarding the unadjudicated homicide of Blaze, defendant originally directed the authorities to his body during her interrogation concerning the Brandon homicide. While defendant originally claimed Blaze had been killed by a gang member as a result of a drug debt, forensic evidence later demonstrated he had actually been killed in the car owned by defendant's mother. The bullet recovered from the back of Blaze's skull had the same class characteristics as the bullet recovered from the tree in Mississippi; additionally, a cartridge casing found near Blaze's body matched the cartridge case found in Mississippi where the defendant's father had earlier fired the weapon. High velocity blood spatter and other bloodstains matched to Blaze were found in the defendant's mother's automobile and on Coleman's right boot and right pant leg. Blood spatter evidence indicated Coleman was in the driver's seat of the vehicle while Blaze rode as the passenger and that the gunshot to the back of Blaze's head originated from the back seat of the car. Defendant later admitted shooting Blaze in an unsolicited letter to the assistant district attorney.

During the penalty phase, the defendant offered mitigation evidence from her mother,

Brenda, Dr. Mark Vigan, an expert in psychology, Dr. Richard Williams, an expert in general medicine and psychiatry with a psychiatric specialty in the treatment of addiction disorders, and Dr. James Patterson, an expert in medicine, psychiatry, and functional neuroimaging. The thrust of this evidence was to show the defendant suffered from Fetal Alcohol Syndrome (FAS),[6] that FAS caused her to have diminished mental capacity, and that this syndrome adversely affected her decision-making process.

The defendant's mother testified that she drank whiskey during the first three months of her pregnancy and that afterwards she switched to beer. She told the jury she named the defendant Brandy because that was the drink she liked. She stated the defendant had a propensity for eating rocks and that she was in special education classes when she was in school. She explained to the jury that defendant was institutionalized at Sand Hill Hospital in Mississippi for six months when she (defendant) was allegedly raped at twelve years of age.

Dr. Vigan and his staff conducted a battery of neuropsychological tests which examined five major areas: the neuropsychological deficit scale; the

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[6] Dr. Williams testified that the cause of Fetal Alcohol Syndrome is the toxic effects of alcohol on the fetus. He further stated that fetal alcohol syndrome is a cluster of symptoms characterized by four criteria. The following criteria must be fully met for an FAS diagnosis: (1) growth deficiency - prenatal or post-natal height or weight (or both); (2) three FAS facial features (shortened palpebral fissures – that means the inner portion of the eye is shorter than normal by two standard deviations; a flattened philtrum – that means a flattening of the portion between the upper lip and the bottom of the nose; and thinness of the upper lip); (3) central nervous system damage; and (4) prenatal alcohol exposure.

impairment index; the category test; the drawing test; and the localization score of the tactual performance test. Out of these five tests, the defendant tested positive in three of them. Commenting on these test results, Dr. Vigan stated "these results indicate borderline intelligence, but not chronic static organic brain syndrome." Trial Tr. Vol. XXX, p. 6090 (Feb. 16, 2005). He further stated these tests showed defendant suffered from "organic brain impairment, or loss of mental and emotional – loss of cognitive abilities secondary to some kind of brain dysfunction or damage or abnormalities." Id. at 6091. Although Dr. Vigan's staff suggested the defendant may have FAS based upon their observation of her facial features, he stated he could not make that diagnosis because he is not a medical doctor and that diagnosis is a medical one.

Under cross-examination, Dr. Vigan agreed that the defendant basically functions mentally at least on a seventh grade level.[7] He also concluded the defendant is responsible for her actions, that she lacked empathy for other people, and she did not learn well from her prior punishment.[8] He further

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[7] Although this testimony was not presented to the jury, Dr. Vigan testified at the pre-trial hearing on the defendant's motion to quash that the defendant's full scale IQ was 77, a score that was in the borderline range of measured intelligence.

[8] The defendant has juvenile delinquency adjudications for the following offenses: carrying a concealed weapon; attempted simple escape; damage to property; possession of stolen property; theft; and unauthorized entry of an inhabited dwelling.

As an adult, defendant has felony convictions for attempted aggravated escape and aggravated battery. In addition, she has the following misdemeanor convictions: seven counts of simple criminal damage to property; four counts of simple battery; and two counts of battery of a police officer.

noted that although the defendant had been evaluated numerous times by various members of the psychiatric community, none of them ever diagnosed her as having FAS.

Dr. Williams opined that the defendant has a diminished capacity for her responsibility because she has brain damage. "She [the defendant] had brain damage not by her own choice. It was a conduit from the toxicity of alcohol. So I think she has a diminished capacity in accepting responsibility for her behavior." Trial Tr., vol. XXX, p. 6162 (Feb. 16, 2006). Dr. Williams further stated he found the defendant "has a borderline level of intellectual functioning. I think under axis three that she has brain damage and brain dysfunction as a result of fetal alcohol syndrome." Id. at 6138. He agreed that persons who suffer from FAS "often experience mental health problems, disruptive school experience, inappropriate sexual behavior, trouble with the law, alcchol and drug problems, and difficult[y] in caring for themselves." Id. at 6162. In quantifying the degree of FAS, Dr. Williams opined that the defendant fit into the FAS categories, but her case was not the most severe. Dr. Williams further stated that brain scans, such as the ones requested from Dr. Patterson, were necessary to confirm a diagnosis of FAS. In conclusion, Dr. Williams stated "this possibly [may] be the very first case in American jurisprudence where somebody was convicted of first degree [murder] and the evidence of

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At 15 years of age, the defendant was sentenced to juvenile prison until the age of 21 for unauthorized entry of a dwelling. While she was in juvenile prison at the Jetson Correctional Center for Youth, she was charged with multiple counts of battery. Ultimately she was sentenced as an adult to two years at the Louisiana Correctional Institute for Women.

fetal alcohol syndrome was presented to a jury in the death phase." Id. at p. 6194.

Dr. Patterson, the medical expert in psychiatry and neuroimaging, was the last medical expert to testify on the defendant's behalf during the penalty phase. The defendant presented his testimony "[t]o evaluate the brain scans from the defendant for abnormalities." Id. at p. 6199. His evaluation included an MRI and a PET scan of the defendant's brain. He found the MRI showed significant structural abnormalities of the defendant's brain that were "consistent with published reports on brain findings in fetal alcohol syndrome." Id. at p. 6200. He also stated that the MRI did *not* show other brain abnormalities associated with the published literature in FAS, i.e., defects in the corpus callosum; changes in the ventral frontal cortex; changes of the hippocampus; decreased brain metabolism. He found the PET scan showed abnormalities, "but the results were not consistent with published results [on fetal alcohol syndrome]." Id.

As noted above, after reviewing the evidence, including the mitigating evidence, the jury was unpersuaded by the experts' mitigation evidence and an unanimous jury determined a sentence of death should be imposed.

MENTAL COMPETENCY TO PROCEED TO TRIAL

(Assignments of error 1, 2, and 3)

Defendant contends the trial court erred when it ruled she had the mental capacity to stand trial. In the present case, the record shows the defendant filed a motion for the appointment of a sanity commission on March 17, 2005, nearly a year before

trial. In the request for a sanity commission, defense counsel alleged difficulties in communicating with the defendant and noted her placement in the mental health unit of the jail; earlier learning and developmental disorders; and the possibility she suffered from FAS. The trial court granted the motion and appointed psychiatrists, Dr. Charles Armistead and Dr. George Seiden, to the sanity commission.

Dr. Armistead met defendant and submitted a report describing their interaction in detail, including her responses to a number of questions posed to ascertain her competency. At the conclusion of the report, Dr. Armistead opined:

> This patient is considered to be of borderline intelligence, but appears to understand the charges against her, the general function of her lawyer and the judge and the trial procedures. She also understands the consequences of being found guilty and not guilty. She apparently has a history of a psychotic disorder, perhaps bi-polar with depressive episodes of elation. She is considered able to stand trial and able to cooperate with her lawyer in her own defense. From her ability of [sic] recollect and recount the events with which she is charged, it is my impression that she was competent at the time of the alleged offenses and understood the meaning and significance of her acts, although perhaps influenced by the use of cocaine at the time.

Trial Tr., vol. XI, p. 2352 (March 30, 2005).

Dr. Seiden also interviewed defendant personally and reviewed 30 documents (many of them police reports relating to the crime) which he used to assist in his evaluation. In his report, Dr. Seiden thoroughly described his interview with the defendant, including several of her responses to his inquiries verbatim, and offered the following opinion:

> Based on my evaluation, I have concluded that Brandy Alaine [sic] Holmes currently has the ability to consult with her attorney with a reasonable degree of rational understanding and currently has a rational and factual understanding of the proceedings against her. Specifically, she understands the nature of the charges against her and can appreciate their seriousness. She understands what defenses are available to her. She can distinguish a guilty plea from a not guilty plea and understands the consequences of each. She has an awareness of her legal rights. She understands the range of possible verdicts and the consequences of conviction. She has the ability to recall and relate facts pertaining to her actions and whereabouts at certain times. She has the ability to assist counsel in locating and examining relevant witnesses. She has the ability to maintain a consistent defense. She has the ability to listen to the testimony of witnesses and inform her lawyer of

> any distortions or misstatements. She has the ability to make simple decisions in response to well-explained alternatives. If necessary to her defense strategy, she is capable of testifying in her own defense. Her mental condition is not likely to deteriorate under the stress of trial.
>
> I have also concluded, with reasonable medical certainty, that at the time of the alleged offense, Ms. Holmes was not suffering from any mental disease or defect that rendered her incapable of distinguishing right from wrong with reference to the conduct in question.

Trial Tr., vol. XI, pp. 2363-64 (April 27, 2005).

The State and defense submitted the matter based on the reports and the trial court found the defendant possessed the mental capacity to proceed. Despite the experts' conclusions concerning her competency, the defendant claims the doctors' observations of her raised serious questions concerning her mental capacity to proceed.

It has long been established that a person whose mental condition is such that he lacks the capacity to understand the nature of the proceedings against him, and is unable to assist counsel, may not be subject to trial. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). Thus, in order to proceed with trial, a defendant must be "legally competent." Medina v. California, 505 U.S. 437, 449, 112 S.Ct. 2572, 2579, 120 L.Ed.2d 353, 365-66 (1992). Louisiana's statutory scheme for detecting mental incapacity "jealously guards a

defendant's right to a fair trial." State v. Nomey, 92-1631 (La.1/19/93), 613 So.2d 157, 161, (quoting State v. Rogers, 419 So.2d 840, 843 (La.1982)). Notwithstanding, Louisiana law presumes defendant's sanity. La. Rev. Stat. § 15:432; State v. Edwards, 243 So. 2d 806 (La. 1971). Thus, the burden is upon the accused to establish by a preponderance of the evidence that the mental incapacity delineated in La. Code Crim. Proc. art. 641 exists. State v. Frank, 96-1135 (La. 10/4/96), 679 So. 2d 1365, 1366; State v. Morris, 340 So. 2d 195 (La. 1976).

La. Code Crim. Proc. art. 641 provides that "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." Although a trial court may receive expert medical testimony on the issue of a defendant's competency to proceed to trial, the ultimate decision of capacity rests alone with the trial court. La. Code Crim. Proc. art. 647; Rogers, 419 So. 2d at 843. A reviewing court owes the trial court's determination of a defendant's mental capacity great weight, and its ruling should not be disturbed in the absence of manifest error. State v. Perry, 502 So. 2d 543, 549 (La. 1986), cert. denied, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987); State v. Machon, 410 So. 2d 1065, 1067 (La. 1982); Morris, 340 So.2d at 203.

In State v. Bennett, 345 So. 2d 1129, 1138 (La. 1977), this Court held that the appropriate considerations for determining whether the accused is fully aware of the nature of the proceedings include:

> whether he understands the nature of the charge and can appreciate its

> seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction.

Additionally, in determining an accused's ability to assist in his defense consideration should include:

> whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial.

Bennett, 345 So. 2d at 1138 (citations omitted).

The defendant first points to a portion of Dr. Armistead's notes where he quoted defendant misstating the charges pending against her. Despite defendant's contention in this regard, we note that

while she may have not correctly identified all the charges she faced, she accurately told the doctor she had been accused of two murders. In addition, she correctly identified the pending charges when Dr. Seiden interviewed her.

Next, the defendant questions Dr. Armistead's conclusion she could assist in her own defense because he noted in his report that she wanted to hurt herself during the trial of her co-defendant, Coleman. Dr. Seiden also referenced an alleged suicide attempt by defendant that occurred during Coleman's trial. Notwithstanding the defendant's statements concerning suicidal ideation, our review of the record shows both doctors concluded such ideation would not interfere with her ability to assist in her own defense. In light of defendant's contention, we note it is hardly surprising that a defendant facing a capital murder charge may be depressed or contemplate suicide; as noted in the medical testimony, the defendant was receiving a prescribed anti-depressant during her incarceration pending trial. Moreover, the record shows that in an addendum to his report, Dr. Seiden stated he reviewed supplemental reports provided to him by various institutions and hospitals where defendant resided before committing the present offense and that these records "suggest that she exaggerated . . . details of her past history" including multiple references to past suicide attempts. Trial Tr., vol. XI, p. 2365 (April 27, 2005).

Additionally, the defendant attempts to demonstrate she was not competent to stand trial because several police reports reveal that she gave inconsistent and sometimes implausible statements concerning the crimes. In particular, the defendant points to the fact she gave multiple versions of the incidents in an effort to minimize her or her

boyfriend's culpability. She contends this evidence contradicted Dr. Seiden's belief she could assist counsel. Accepting the defendant's contention in this regard for purposes of argument, we observe such facts alone do not suggest she was unable to assist counsel at trial.

Next, as evidence of her inability to comprehend the charges or assist in her defense, appellate counsel calls our attention to a letter the defendant wrote to the district attorney in which she suggests her dissatisfaction with a plea offer trial counsel tendered to her. The letter reads:

> Good Evening Sir! I apologize to Mr McClatchey, But this isn't true. But Sir let me put my point across please. If I refused to take your offer of 2 life sentences, what in the world would you Believe, I would ask my Lawer (which do not see eye to eye) to come back with a much more offering, then you guy's asked me to accept. Mr. McClatchey told me I'll Be Better off with life. Yes I did shot & kill Terrance Blaze, but only because I was threatting and Beatting up to do so. I'm asking would you, please disregard this plead offering. Because I did not ask him to take this act. Thank you and have a nice day.

Trial Tr., vol. V, p. 1098 (Feb. 6, 2004).[9]

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[9] The State introduced a redacted version of this letter at the penalty phase. Admission of this evidence is the subject of a separate assignment of error discussed infra.

Defense counsel maintains the incriminating content of the letter demonstrates the defendant possessed no understanding of the legal consequences relating to her role in the crimes and thereby rendered her incompetent. After reviewing the defendant's contention, we find no support for it. Although the letter suggests the defendant may not have understood the legal subtleties relative to the law regarding principals, in no way does it demonstrate she could not assist counsel in her defense.

Finally, in addition to arguing the trial court should have found the defendant incompetent irrespective of the sanity commission's conclusion to the contrary, the defendant asserts that additional evidence presented following the submission of the sanity commission's reports should have prompted the trial court to reconsider its earlier ruling. With that as her impetus, a week prior to trial, defense counsel reurged the motion to quash the indictment, contending new evidence was available for the trial court's consideration. Specifically, the defendant argues the trial court should have considered the evidence her experts provided in support of the motion to quash the indictment, alleging that FAS rendered her functionally mentally retarded and hence ineligible for the death penalty; she further contended that newly obtained neuroimaging had revealed multiple areas of her brain were abnormal and impaired.[10] She contends that in light of this

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[10] When the defendant renewed her motion to quash and admitted the color photographs of her brain, she also attached the report of the MRI and PET Scan findings. Dr. James C. Patterson, II, an expert in neuroimaging, found abnormalities in multiple regions of the brain when he subjected the MRI result to objective statistical evaluation. Although he testified that some of these abnormalities were consistent with published results on FAS, the defendant did not

evidence, the trial court should have revisited the issue of whether she maintained the capacity to stand trial.[11] Defendant further relies upon

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have other expected brain abnormalities, i.e., defects in the corpus callosum; changes in the ventral frontal cortex; changes of the hippocampus; decreased brain metabolism. In summation, Dr. Patterson testified the only brain abnormality found in the MRI was a dysmorphic, or funny-shaped, central nucleus of the amygdala; he could not relate any PET scan abnormalities to published results on FAS.

[11] Defendant points specifically to two portions of Dr. Vigan's testimony relevant to the Bennett criteria. See pp. 11 - 12, supra. First, she maintains her limited attention span would have rendered her incapable of assisting counsel as demonstrated by Dr. Vigan's testimony that:

> . . . Miss Holmes is sort of a story teller. She'll tell stories that will quick[ly] bring attention. She's easily distracted in terms of being able to stay on point and move from point A to point B to point C. She will meander. Her listening and comprehension of ideas is poor so it's difficult, I think it's difficult for her to understand the abstractions of things.
>
> So for example, if you tell her, if you put your hand into a fire, you're going to get burned, she'd understand that. But if you tell her that A is going to stand for a certain numerical value and B is going to stand for another numerical value and you're going to manipulate those values, she's not going to understand that. Or if A is equal to B and B is equal to C, she's not going to be quick to understand that A equals C. So in terms of abstraction and connecting ideas, which this courtroom demands, she's going to have a greater limitation.
>
> The analogy that I used previously I think actually in front of Judge Crichton, the courtroom – some people come into courtroom

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with one megabyte of RAM. And when they're in my office I can teach them and get answers and work with them. But then when you come into this courtroom, you need 100 megabytes of RAM. She has to be able to sit and listen to my answer. She has to listen to your question. She may have to sit and listen to [the counsel for the State] and consider what he's saying. She has to listen to what the judge is saying. She has to listen to witnesses. We're talking about things that she may know something about, then be able to help both of you and inform you. All of that is a complex process.

Trial Tr., vol. XIX, pp. 4200-01 (Nov.10, 2005).

Defendant also points to Dr. Vigan's testimony suggesting she may make an unsuitable witness:

> She is impulsive. She is emotionally reactive. She doesn't speak well. She doesn't understand a lot of times the import of questions, as many of us have that, but she has certainly a deficit of that. She doesn't present as someone who takes this seriously. She, in my interview with her, she didn't like me because I was talking with her about how absolutely serious this is.
>
> I wasn't trying to tell her that I was in favor of a jury giving her the death penalty, but I was trying to talk with her about how serious the death penalty is and how serious this whole process is. She misperceived all of that, telling my assistants and Dr. Williams that she didn't want to see me again because I was for her getting the death penalty or something like that.
>
> So, it's just in my ability to really get her to tell the truth, be accurate with the truth, as many facts as possible; I had trouble getting that from her. You would have trouble getting that from her probably as well. It was all

documents relating to the MRI and PET scans produced at the hearing relating to her low intelligence and diminished brain.

Even assuming the defendant met the statutory definition of mental retardation delineated in La. Code Crim. Proc. art. 905.5.1, an issue ultimately unresolved below because defense counsel did not present this issue to the jury, it would not necessarily follow that she was incompetent to stand trial. Equating competency, which addresses a defendant's ability to understand the proceedings and to assist in her own defense, see La. Code Crim. Proc. art. 641, with mental retardation, which acts as a mitigating circumstance exempting a defendant from the death penalty, constitutes an hyperbole and does not accord with this state's well-accepted jurisprudence. Cf. State v. Brogdon, 426 So. 2d 158, 168 (La. 1983) ("while subnormal intelligence is a relevant factor in assessing a defendant's present capacity to stand trial, it is not of itself dispositive of the issue. . . . "). Notably, defendants with IQ's in the 60's have been shown competent to stand trial. State v. Brooks, 541 So. 2d 801 (La. 1989); State v. Charles, 450 So.2d 1287 (La. 1984). See also, State v. Bennett, 345 So. 2d 1129, 1139 (La. 1977) (on reh'g) ("Unlike mental illness, which is a variable state, difficult to measure retrospectively, mental retardation is a more static condition and hence its effect upon defendant's capacity to stand trial can be as easily determined now as it could have been contemporaneously with the trial").

Finally, as the State ably points out, the record contains several letters the defendant

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misperceived in my hour and a half interaction with her.

Trial Tr., vol. XIX, pp. 4201-02 (Nov. 10, 2005).

authored while she was incarcerated awaiting trial. Although these letters do not demonstrate a sophisticated knowledge of the legal system, their content supports the proposition that the defendant understood the nature of the proceedings and the serious charges pending against her.[12]

In summation, members of the sanity commission unanimously opined the defendant was competent. Moreover, even Dr. Vigan, whose

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[12] See, e.g., one letter, the defendant penned to a friend. It reads:

> Hey Chaz,
>
> I know you thought I forgot about you. No Never that Honey. I'm Back locked up if you didn't see it on the news or in the newspaper. Girl, yes. They got me charged with 1st degree murder armed robbery attempted 1st degree murder and 2nd degree murder. I sit there and watched my Baby's Daddy kill these white folks and yes I took the Visa card the gold Mastercard and the codes and cleaned there Bank accounts out. They was going to Book my 15 year old Brother, But I went ahead and took all charges & I have Affidavit to get notarized so I can let my Baby's daddy go to[o]. You know damn well I'm going to try my Best to escape and you know this too. I got it mostly planned. Don't be mad, Chaz. I gotta have my Money ya know. I goes back to court Feb. 18th 03 Girl don't worry yourself about me. I'll be okay, I guess you know. You be cool and write me back and tell me the low down/ who all is Back up in there okay. Here's my address okay. . . .
>
> Love Always,
>
> Ms. Brandy

Trial Tr., vol. X, pp. 2105-06 (Jan. 17, 2003).

testimony defendant primarily relies upon in support of this claim and who admitted he did not examine her to determine competency, testified she understood her rights and was able to communicate with her attorneys. Ultimately, Dr. Vigan conceded he had not "specifically examined [defendant] for competence to stand trial," and had not "administered any competency to stand trial tests." Rather, he "assume[d] that the other doctors, Dr. Armistead, Dr. Seiden, and Dr. Williams all have commented that she's competent to proceed to trial." Trial Tr., vol. XIX, p. 4197 (Nov. 10, 2005). Finally, at the penalty phase, Dr. Vigan effectively conceded defendant's competency, stating:

> [T]wo sanity physicians evaluated her for competency to stand trial, and they found her competent. So those doctors would have examined her ability to understand the rights that she has. She certainly . . . know[s] that she has a right to a trial and a trial by jurors. She certainly knows she has a right to consult with her attorneys, and she has been doing that and working with them. And the sanity doctors have already found that she's competent to proceed to trial. So I think she's – I would assume that she can understand to the minimal at least what legal rights are about.

Trial Tr., vol. XXX, p. 6128 (Feb. 16, 2006).

Considering the totality of this evidence and the trial court's personal observations of the defendant, we find nothing suggests the trial court committed

manifest error when it found the defendant mentally competent to stand trial. This argument lacks merit.

MENTAL RETARDATION
(Assignment of error 11)

Next, relying upon Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) and Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), defendant claims she suffers from compromised intelligence and a diminished mental age as a result of FAS. See supra, p. 6, n. 4 (explaining FAS). Accordingly, she contends her death sentence constitutes excessive punishment and must be vacated.

In support of her claim, defendant filed a "Motion to Quash Indictment" in the trial court, alleging she possessed "neurological and psychological deficiencies" that disqualified her from the death penalty based on the Supreme Court's rationale in Atkins (exempting mentally retarded persons from capital punishment) and Roper (holding that the Eighth Amendment precludes capital punishment for offenders under the age of 18 when they committed their crimes).[13]

The State opposed the defendant's motion to quash, arguing that "a factual defense to any charge (such as minority or mental retardation at the time of the offense) is not a proper ground for a motion to quash" and that the matter should be decided by a jury. Trial Tr., vol. XII, p. 2580 (Sept. 23, 2005).

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[13] Although defendant was 23 years of age when she committed the crime, she suggests she had the emotional and mental development of a child. Thus, she contends the holding of Roper should be applicable to her.

Nevertheless, the State did not oppose a pre-trial hearing on the motion so that it could obtain discovery concerning the evidence defendant relied upon on the issue. Id. Notwithstanding, the State firmly maintained that its argument would remain "the same; neither Roper nor Atkins apply to this case, and the court should not extend them 'by analogy,' and cannot make any sort of pre-trial determination of a factual defense via motion to quash." Id.

The trial court conducted an extensive hearing on defendant's motion to quash. Specifically, the trial court received testimony from psychiatrist Dr. Richard Williams and psychologist Dr. Mark Vigan.[14] However, at the conclusion of the hearing, the trial court found no legal basis existed for it to grant the motion to quash the capital prosecution. It stated:

> . . . . I have had a chance to carefully review that motion [to quash] as well as the attached report from Dr. Vigan, which is in conjunction, of course, with his testimony. I would note for the record, of course, Code of Criminal Procedure, Article 532 through 533; and I will also note for the record the unrebutted testimony of the IQ of Miss Holmes, which is 77 which is borderline. I understand all of what I have heard today through the testimony of Dr. Vigan and Dr. Williams.

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[14] The substance of the testimony of Dr. Williams and Dr. Vigan is detailed at various places throughout this opinion.

> However, I conclude that as a matter of law that there is no legal basis for me to grant the motion to quash. Accordingly, motion to quash the indictment is denied in all respects.
>
> If we get to the penalty phase, if we get to the penalty phase, of course, the jury can hear all of the evidence presented today as well as any other evidence, some of which the DA may want to present. Motion denied.

Trial Tr., vol. XIX, pp. 4215-16 (Nov.10, 2005).[15]

A week before trial, defendant filed a "Motion to Re-Urge Motion to Quash Indictment" in which she claimed neuroimaging of her brain revealed abnormalities and impairments that further

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[15] Despite the fact the issue of mental retardation, as required by statutory law, was properly reserved for the jury and not the trial court, the defendant neither requested that the jury definitively decide the issue as authorized by La. Code Crim. Proc. art. 905.5.1(B) nor sought a jury instruction charging jurors that it could not return a death verdict if it determined defendant was mentally retarded. Ultimately, because the defendant did not file the required notice and argue the issue of mental retardation to the jury as required by La. Code Crim. Proc. art. 905.5.1, the issue was not preserved for appellate review. At this point in these trial proceedings, it is not within our province to second-guess the wisdom of this course of action or delve into the trial strategy that well-seasoned and experienced capital defense counsel chose to employ. See State v. Myles, 389 So. 2d 12, 39 (La. 1980) (recognizing that this Court "does not sit to second-guess strategic and tactical choices made by trial counsel.") Notwithstanding, we observe the defendant presented evidence from three experts at the penalty phase alleging she suffered from fetal alcohol syndrome and argued that as a mitigating factor during sentencing.

established she suffered from fetal alcohol syndrome which rendered her ineligible for execution under Atkins and Roper. In response, the State reiterated that the trial court lacked the authority to grant the motion, arguing:

> [La. Code Crim. Proc. art.] 905.5.1 is very clear that defense counsel has to make the claim first that the defendant is mentally retarded, which they haven't done; and second, before the court . . . [can] make any sort of pretrial ruling, both the State and the defense have to agree that so be done, and that wasn't done here either. So I don't understand why we're even talking about mental retardation here. Absent some sort of proper notice by the defense that they're going to claim mental retardation defense and absent some agreement by both parties, this court doesn't have any power to do anything concerning mental retardation.

Trial Tr., vol. XIX, P. 4214 (Nov. 10, 2005).

The trial court agreed and denied the defendant's re-urged motion, stating, "I believe there is no basis whatsoever to quash the indictment even based on the new material submitted to the Court." Trial Tr., vol. XIX, p. 4268 (Jan. 31, 2006).

Defendant now argues the trial court should have ruled on the merits of her mental retardation claim based upon FAS and found her ineligible for the death penalty. We disagree.

La. Code Crim. Proc. art. 905.5.1, added to the Code of Criminal Procedure by 2003 La. Acts 698 in response to Atkins, provides the procedure for use in the event a defendant raises a claim of mental retardation. In particular, La. Code Crim. Proc. art. 905.5.1 provides, in pertinent part:

> C.(1) Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone. (Emphasis added).

In State v. Turner, 05-2425 (La. 7/10/06), 936 So. 2d 89, 96-97, cert. denied, ___ U.S. ___, 127 S.Ct. 1841, 167 L.Ed. 2d 337 (2007), we upheld the constitutionality of La. Code Crim. Proc. art. 905.5.1. Specifically, we upheld the jury provision of art. 905.5.1 as follows:

> If the State may consign to a jury the complex factual and legal question of whether a defendant suffers from a mental disease or defect rendering him incapable of distinguishing between right and wrong and thereby exempting

> him from criminal responsibility altogether, La. Rev. Stat. 14:14, then, a fortiori, the State may assign to a jury the task of determining whether defendant is mentally retarded and exempt, not from criminal culpability, but from the death penalty. . . .
> * * *
>
> Notwithstanding the concerns expressed by some commentators and courts, absolutely no jurisprudence suggests that requiring the jury rather than the court to decide whether the defendant has established mental retardation violates due process or a defendant's Eighth Amendment rights. Neither Atkins nor other controlling legal principles compel the selection of a specific fact finder regarding mental retardation or require the determination be made at a specific point in the adjudication process. As to any requirement that a trial judge should in all cases make an initial pretrial finding on the question of mental retardation, that policy choice, whether wise or unwise, is for the Legislature.

Turner, 936 So. 2d at 99. (Emphasis added) (citations omitted).

In the present case, the record clearly shows the State did not acquiesce to submitting the issue of mental retardation to the trial judge. The record likewise establishes the defendant never submitted the issue of mental retardation for jury

determination. Accordingly, not only did the trial court lack the legal authority to quash the indictment based on the defendant's allegations, the issue was never presented for determination during the capital sentencing hearing. Therefore, defendant's assignment of error lacks merit.

DUE PROCESS

(Assignments of error 4 and 5)

The defendant first contends the State violated her due process rights when it offered an alternate theory of the crime at the trial of her co-defendant, Robert Coleman, and argued a different theory of the crime to the jury in her trial. In a related matter, the defendant further argues the trial court erred when it granted the State's motion in limine preventing her from presenting any evidence at either the guilt or penalty phase of the trial, revealing that Coleman had been convicted of first-degree murder and sentenced to death.

Due process forbids a state from employing inconsistent and irreconcilable theories to secure convictions against individuals for the same offenses arising from the same event. Smith v. Groose, 205 F.3d 1045, 1048-49 (8th Cir. 2000), cert. denied, 531 U.S. 985, 121 S.Ct. 441, 148 L.Ed.2d 446 (2000)(convictions of accomplices in a murder/robbery were obtained at separate trials through diametrically opposed testimony from a third participant; such manipulation of evidence rendered trial fundamentally unfair and required reversal); compare Nichols v. Scott, 69 F.3d 1255, 1268-72 (5th Cir. 1995)(guilty plea of one co-defendant does not preclude murder prosecution of the other when it could not be determined whose gun caused the fatal wound).

In support of her argument to this Court, the defendant draws our attention to the United State Supreme Court's recent decision in Bradshaw v. Stumpf, 545 U.S. 175, 125 S.Ct. 2398, 162 L.Ed. 2d 143 (2005). There, Stumpf and his partner, Wesley, both armed with guns, robbed Mr. and Mrs. Stout in their Ohio home; they then shot the couple, and left them for dead. Police learned the identities of the perpetrators, and Stumpf surrendered to the police. After learning that Mr. Stout survived the shooting, Stumpf confessed to shooting him twice in the head, but denied inflicting the injuries that killed Mrs. Stout. Stumpf pleaded guilty, and proceeded to the penalty phase, held before a three-judge panel, in which he made a threefold argument in mitigation: (1) that he had participated in the plot at the urging of Wesley; (2) that it was Wesley who had fired the fatal shots into Mrs. Stout; and (3) that his minor role in the murder militated against a death sentence. The panel rejected Stumpf's arguments and sentenced him to death.

Subsequently, Wesley was successfully extradited to Ohio where the same prosecutor tried the case before the same trial judge. By the time of Wesley's separate trial, new evidence had arisen since Stumpf's plea, namely, Wesley's cellmate, Eastman, testified Wesley admitted to him that he fired the shots that killed Mrs. Stout. The prosecutor argued that Wesley was the principal offender in Mrs. Stout's murder; thus, he should be sentenced to death. Wesley countered that the prosecutor had taken a contrary position in Stumpf's penalty phase trial, and that Stumpf had been sentenced to death for the crime. Wesley testified that Stumpf had shot Mrs. Stout. Ultimately, the jury sentenced Wesley to life imprisonment with the possibility of parole after 20 years. Stumpf, 545 U.S. at 180, 125 S.Ct. at 2404.

Thereafter, Stumpf, whose direct appeal was pending, attempted to withdraw his guilty plea or vacate his death sentence. Stumpf's action was based on the prosecution's argument at Wesley's trial that Wesley had been responsible for Mrs. Stout's death. Eventually, Stumpf's case was considered in the United States Supreme Court where he urged the invalidity of his guilty plea based on his claim he was unaware of the specific intent element to the aggravated murder charge, and that his due process rights had been violated by the state's deliberate action in securing convictions of both Wesley and him for the same crime, using inconsistent theories. Stumpf, 545 U.S. at 182, 125 S.Ct. at 2405.

The Supreme Court upheld Stumpf's guilty plea as valid, and found he exhibited the requisite specific intent to support a plea of guilty to aggravated murder, specifically when he put a gun to Mr. Stout's head and fired twice. The Court held that the aggravated murder charge did not require any showing that Stumpf had personally shot Mrs. Stout; rather, the Court observed Ohio law considers aiders and abettors equally in violation of the aggravated murder statute, as long as the aiding and abetting is done with the specific intent to cause death. Id., 545 U.S. at184, 125 S.Ct. at 2406. Finding that Stumpf and Wesley shared the same deadly intent, the Court found it immaterial which of the two men actually shot Mrs. Stout and upheld the guilty plea, noting that:

> Stumpf and Wesley had gone to the Stouts' home together, carrying guns and intending to commit armed robbery. Stumpf, by his own admission, shot *Mr.* Stout in the head at close

> range. Taken together, these facts could show that Wesley and Stumpf had together agreed to kill both of the Stouts in order to leave no witnesses to the crime. And that, in turn, could make both men guilty of aggravated murder regardless of who actually killed Mrs. Stout.

Stumpf, 545 U.S. at 184, 125 S.Ct. at 2406 (emphasis in original).

The Supreme Court's reasoning with respect to principals to capital murder comports with this Court's holding in State v. Anthony, 98-0406 (La. 4/11/00), 776 So. 2d 376, 385-87 (holding that the State is not required to show defendant actually pulled the trigger in order to sentence him to death in a first-degree murder prosecution; instead to carry its burden of proof successfully, the State must prove defendant acted in concert with his co-perpetrators, that defendant had the specific intent to kill, and that one of the aggravating elements enumerated in the first-degree murder statute was present).[16]

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[16] In Anthony, all three perpetrators to the restaurant robbery/murder brought handguns and fashioned a crude silencer using potatoes which they placed on each gun's barrel. Id., 776 So. 2d at 380-81. The planning exhibited in bringing such a device to the robbery of the restaurant strongly suggested each gunmen anticipated using his weapon. Even though Anthony claimed he was not the shooter, one of the surviving victims testified the last person he saw before the shots rang out in the walk-in cooler was defendant; the survivor stated defendant was holding a gun with a potato on the end of the barrel. Moreover, circumstantial evidence demonstrated that of the three perpetrators, defendant's shoes were the most heavily encrusted with potato particles. Accordingly, we ruled that "even without establishing that [Philip Anthony] was the triggerman, his conviction is valid

Addressing Stumpf's due process rights, the Court opined the prosecutor's use of allegedly inconsistent theories "may have a more direct effect on Stumpf's sentence" because arguably "the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." Id., 545 U.S. at 187, 125 S.Ct. 2407-08. Nevertheless, the Court deemed the issue premature and remanded the case to the Sixth Circuit Court of Appeals to consider the question of how Eastman's testimony and the prosecutor's conduct in the Stumpf and Wesley cases relate to Stumpf's death sentence in particular. Id., 545 U.S. at 187, 125 S.Ct. at 2408.

In the present case, the defendant contends that in Coleman's trial, the State argued he was the individual who shot Julian Brandon and inflicted the majority of the crime scene carnage. Referring to blood spatter on Coleman's boots, the State argued, "That puts those boots on the killer shoving that gun up under [Rev. Brandon's] chin and pulling the trigger." Brief for the Appellant, p. 14, n. 17. The State also presented evidence that Coleman admitted shooting Julian Brandon to two of his cellmates. During its closing argument at the penalty phase in the Coleman trial, the State described Coleman "butchering" Julian Brandon and described his conduct as follows:

> . . . . After a gun shot wound, probably after several killing stab wounds to the chest all of which didn't satisfy. And then he's got to saw into his neck. He's sawing in the neck of . . . our must

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because he was involved in a felony-murder and he intended, from the outset, to kill these victims." Id. at 386.

> vulnerable citizens. That's why you need to kill him. His attack was done without mercy.

Brief for the Appellant, p. 15.

In argument to us, the defendant contends the State "abruptly changed course" at her trial. While maintaining it was only required to prove her participation as a principal, she argues the State relied heavily on the statement in which she admitted to shooting Julian Brandon. At the defendant's trial, the State also presented testimony from Caddo Parish Sheriff's Office (CPSO) Captain Bobby Abraham concerning his interview with defendant in which "she describe[d] herself basically as the main actor once inside" the Brandons' residence. Trial Tr, vol. XXVI, p. 5430 (Feb.12, 2006). In addition, CPSO Detective Kay Ward testified about the defendant's statement in which she (defendant) claimed she shot both Mr. and Mrs. Brandon and that "Robert [Coleman] was there but he didn't participate in the killing." Trial Tr., vol. XXVI, p. 5508 (Feb. 12, 2006). After the defendant argued at the penalty phase that her diminished mental capacity rendered her less culpable than Coleman, the State responded in its rebuttal with a recapitulation of violent episodes earlier during the defendant's life and stated that Coleman:

> wasn't the catalyst that brought this murder before you. Robert Coleman wasn't there when she battered the corrections officer. Robert Coleman wasn't there when she took a piece of glass and slit the corrections officer. He

> wasn't there when she was killing a kitten.
>
> The signs of her violence have been manifesting for years. She was like a time bomb that finally went off.

Trial Tr., vol. XXX, p. 6236 (Feb.16, 2006).

As borne out in the record and her brief to this Court, defendant's focus on selective portions of the evidence presented and the State's closing arguments at both trials is misleading. As an initial matter, defendant concedes in her brief that at "Coleman's trial, the prosecution argued that Coleman and Holmes both played an active role in the murder of Mr. Brandon [and] . . . charged Coleman as a principal in the alternative." Brief for the Appellant, p. 14. In is abundantly clear that the State was free to speculate which of the defendant's statements was the most truthful concerning her actual participation in the shooting of Julian Brandon. More importantly, during closing argument at the guilt phase, the State argued that even if the defendant was merely "policing up the crime scene making sure nobody gets caught," she was concerned in the commission of the offense and thus guilty as a principal. Trial Tr., vol. XXVIII, p. 5777 (Feb. 14, 2006). During rebuttal closing at the guilt phase, the State further argued:

> We can't say which slice she inflicted, which stab she inflicted, which one of the times the trigger was pulled her finger was on it. But we can tell you that she was there helping, participating. It was too much for one person and that she wanted them dead because she didn't wear a mask and all

> the other things we've told you. When you realize that she had the specific intent to kill, she was involved in the killing and as the defense has conceded the victims were over 65, it was during an armed robbery, a burglary, and there was more than one person, the only appropriate verdict is guilty as charged of first degree murder.

Trial Tr., vol. XXVIII, pp. 5812-13 (Feb.14, 2006).

Similarly at the penalty phase, rather than arguing that defendant was the shooter, as she claimed in one of her statements, counsel for the State argued:

> . . . I don't think we're ever going to have an answer to whose hand the gun was in as it relates to the Brandons and whose particular hand the knife was in as it relates to the Brandons, you have seen what the evidence does show. And that's simply coming back to this concept that they participated part and parcel together from start to finish.

Trial Tr., vol. XXX, p. 6236 (Feb. 16, 2006).

It is axiomatic that at the defendant's trial, the State focused upon her culpability while at Coleman's trial, the evidence centered on his conduct. Cf. State v. Lavalais, 95-0320 (La. 11/25/96), 685 So. 2d 1048, 1056-57, cert. denied, 522 U.S. 825, 118 S.Ct. 85, 139 L.Ed. 2d 42 (1997) ("Although the state's positions in defendant's trial and Smith's trial may appear inconsistent at first

glance, this appearance results from the fact that the state's emphasis as to culpability was different in the two trials . . . . [a]nd that any inconsistencies in the state's position in the two trials does not rise to the level of fundamental unfairness.")(footnote omitted).

In State v. Scott, 04-1312 (La. 1/19/06), 921 So. 2d 904, cert. denied, ___ U.S. ___, 127 S.Ct. 137, 166 L.Ed. 2d 100 (2006), we considered and rejected a similar argument in response to the defense claim that the State had adopted an inconsistent theory to obtain a first-degree murder conviction and death sentence against Scott's co-defendant, James Dunn. There we remarked, finding that the argument:

> in Dunn's trial did not commit the prosecution and therefore jurors to a single theory of Dunn's guilt for the double murder which diametrically opposed and wholly negated any theory of defendant's legal or moral culpability arising out of his complicity in the murders as a principal "concerned" in the commission of the offense. La. R.S. 14:24. The remarks otherwise constitute mere argument of counsel, their understanding of what the facts showed, and thus, not evidence and not admissions of fact within the personal knowledge of a party opponent and that party's representatives for purposes of La.C.E. art. 801(D)(3)(a). This claim fails on the merits.

Scott, 921 So. 2d at 958.

In the present case, as in Scott and Lavalais, the State neither set forth inconsistent nor mutually

exclusive theories of the crime at defendant's and Coleman's trials. To the contrary, it is clear the State merely emphasized each offender's culpability at their respective trials. Accordingly, we find no merit to defendant's argument.

In a related issue, the defendant contends the trial court erred when it granted the State's motion in limine to exclude any evidence that another jury had convicted Coleman of first-degree murder and sentenced him to death for his role in the crime. In its written motion in limine, the State asked the trial court to exclude the evidence at both phases of the defendant's trial, claiming "[i]t is a long established principle of Louisiana law that evidence that another person has been or is being prosecuted for the same offense is incompetent and inadmissible." (Citation omitted). Trial Tr, vol. XVII, p. 3673 (Jan. 27, 2006). Over defense objection, the trial court granted the State's motion as it related to the guilt phase and deferred ruling on whether Coleman's conviction and sentence could be introduced at the penalty phase.

At the conclusion of evidence at the penalty phase, the defense proffered into the record "the minutes from the Robert Coleman case showing that he was convicted and that he would receive the death penalty." Trial Tr., vol. XXX, p. 6208 (Feb. 16, 2006). The trial court admitted the minutes, but stated that "[t]he jury does not get to see that however." Id. Defense counsel responded, "Yes, sir, I understand. That was because of the motion in limine that the State filed." Id.

In its motion for a new trial, defense counsel reurged the issue, and in its ruling denying the motion, the trial court stated,

> . . . . The fact of the matter, I believe the trial record will clearly bear this out, is that neither side wanted any evidence of any results of Coleman's trial.
>
> So, it is really disingenuous to now argue that defense wanted to present to the jury evidence of Coleman's guilt verdict and death penalty verdict. That was not something the defense wanted. They fought against that. Actually it was an agreement by both sides that it would be going outside the record of admissible evidence to present any results on Robert Coleman. So, the record needs to be made clear so that a reviewing judge years from now will not be misled . . . .

Trial Tr., vol. XXX, pp. 6265-66 (Feb. 21, 2006).

As an initial matter, we observe, contrary to the trial court's statement otherwise, nothing in the record shows the defense agreed with the State's motion in limine to exclude the evidence. Correlatively, we further note the State does not point to any support for the trial court's comment in its brief to this Court. Rather, the State contends the trial court's ruling was correct because it prevented the defense "from attempting to lessen the jury's sense of responsibility for convicting and sentencing Brandy Holmes by implying or arguing that since Coleman had received the ultimate sentence Brandy Holmes should get a pass on her sentence." Brief for the Respondent, p. 19.

After reviewing the record in light of the assertions of counsel, we find the State's argument that the evidence was irrelevant at both phases of trial is fully established. As discussed supra, the State did not offer inconsistent theories of the offense at defendant's and Coleman's separate trials. We further note the record fully shows the defense was permitted to cross-examine witnesses and extensively argue Coleman's role in the crime and both parties' relative culpability. Moreover, La. Code Crim. Proc. art. 905.2 provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on the family members." (Emphasis added). Accordingly, evidence relating to Coleman's criminal punishment for his role in the offense was irrelevant and could have very well diverted the jury from the task before it, namely, the character and propensities of the defendant.

After reviewing the jurisprudence, we find the trial court's ruling in the present case accords with State v. Brogdon, 457 So. 2d 616 (La. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2345, 85 L.Ed. 2d 862 (1985). In Brogdon, the defendant attempted to call his co-defendant as a witness in his capital sentencing phase; the co-defendant had been previously tried for the same first-degree murder, convicted, and sentenced to life imprisonment, after the jury was unable to reach a unanimous decision at his penalty phase. Brogdon argued he was entitled to have the jury consider that his codefendant received a life sentence as a mitigating circumstance or as a meaningful basis for deciding whether his case fell within the category of capital or non-capital punishment. Brogdon, 457 So. 2d at 625-26. The trial court disagreed, finding the co-

defendant's sentence was irrelevant. We upheld that decision of the trial court, holding the Legislature did not intend "to require a detailed comparative analysis of other first degree murder cases and sentences by the jury in a capital sentence hearing." Id., 457 So. 2d at 626. Moreover, we observed in Brogdon the function of comparative analysis falls to this Court as part of its Rule 28[17] review of capital sentences. Id. Accordingly, in the present case, the trial court was eminently correct when it prohibited defense counsel from arguing that jurors should spare defendant's life solely because another jury had sentenced Coleman to death and thereby assigned to him the highest degree of moral culpability for the offense. Brogdon, 457 So. 2d at 616. Therefore, these assignments of error lack merit.

MOTION TO SUPPRESS

(Assignments of error 13 - 15)

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[17] La. Sup. Ct. Rule 28 provides in pertinent part:

> **Section 1. Review Guidelines**. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In these assignments of error, the defendant argues the trial court erred when it denied her motion to suppress her multiple inculpatory statements about the crimes. Specifically, she alleges the statements were given in violation of the Fifth and Sixth Amendments of the United States Constitution because she did not voluntarily waive her rights. She further contends she did not want to discuss the offenses. In addition, she maintains the police illegally coerced the statements when they employed "manipulative tactics . . . on a functionally retarded woman with significant brain damage . . . ." Brief for the Appellant, p. 34. Finally, the defendant asserts her statements about the offense were involuntary because her interrogators repeatedly claimed they had evidence implicating her brother in the crime. She contends the repeated assertions of her interrogators were untruthful and thus rendered her subsequent statement about the offense involuntary.

It is hornbook law that before the State may introduce a confession into evidence, it must demonstrate the statement was free and voluntary and not the product of fear, duress, intimidation, menace, threats, inducements or promises. La. Rev. Stat. § 15:451; La. Code Crim. Proc. art. 703(D); State v. Simmons, 443 So. 2d 512, 515 (La. 1983). If a statement is a product of custodial interrogation, the State must make a threefold showing: first, that the person was advised before questioning of his right to remain silent; second, that the person was told that any statement he makes may be used against him; and, third that the person was counseled that he has a right to an attorney, either retained or appointed. Miranda v. Arizona, 348 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966). When claims of

police misconduct are raised, the State must specifically rebut the allegations. State v. Vessell, 450 So. 2d 938, 942-943 (La. 1984). A trial court's finding as to the free and voluntary nature of a statement carries great weight and will not be disturbed unless the evidence fails to support the trial court's determination. State v. Benoit, 440 So. 2d 129, 131 (La. 1983). Credibility determinations lie within the sound discretion of the trial court and its rulings will not be disturbed unless clearly contrary to the evidence. Vessell, 450 So. 2d at 943. When deciding whether a statement is knowing and voluntary, a court considers the totality of circumstances under which it is made, and any inducement is merely one factor in the analysis. State v. Lavalais, 685 So. 2d at 1053; State v. Lewis, 539 So. 2d 1199, 1205 (La. 1989).

At the hearing on the defendant's motion to suppress, Detective Kay Ward, testified concerning her investigation of defendant. Det. Ward stated the defendant became a suspect after she implicated herself in the murder during conversations with neighbors and attempted to sell some jewelry purportedly stolen from the Brandons' residence. On the evening of January 5, 2003, Ward, accompanied by Officers Sheila Hostnick, Bobby Abraham and Bill Duncan, went to the mobile home where the defendant was staying with her mother. There they encountered the defendant, her mother Brenda Bruce, her 15-year-old brother, Sean George, and Robert Coleman. All four agreed to accompany the officers to the sheriff's office. After participating in the interviews of Bruce, George and Coleman, Ward interviewed the defendant.

From the outset, Ward advised the defendant of the customary Miranda warnings. The defendant indicated she understood the Miranda warnings,

signed a waiver of rights form and agreed to give a statement at 12:23 a.m. When the defendant implicated her friend, Johnny Wright, in the murder, Ward decided to record the statement. Ward described defendant as "very cooperative" and stated that at no time she requested to stop the interview or request the presence of counsel.

Based on the initial information defendant had given her, Ward, accompanied by Officer Hostnick and Detective Charles Bradford, left in an effort to locate Johnny Wright while defendant remained at the sheriff's office. After Wright was located and interviewed and his involvement in the present crime was explored, Ward returned and took another statement from defendant at approximately 3:00 a.m. Before making this statement, defendant was Mirandized again and waived her rights. In this statement, the defendant said she had been at the Brandons' residence when the victim had been killed. Ward also learned that while she (Ward) was gone looking for Wright, defendant had told Captain Abraham and Lieutenant Duncan that the Brandons' burned credit cards could be found near the dead body of Terrance Blaze. Ward stated that while she attempted to locate Wright:

> Brandy had told Captain Abraham while he was talking to Brandy and Lieutenant Duncan that – and they were talking about Mr. Brandon's credit cards. And Captain Abraham had asked Brandy what happened to the credit cards, and she said she burned them. And he said, where? And she said, on a dirt road. He said, can you show me? And she said, if I show you that, I have to show you

> something else. And he said, what? And she said, another death body.

Trial Tr., Vol. XIX, p. 4068 (July 21, 2005).[18]

At approximately 4:00 a.m., defendant led Ward and Sergeant Gary Frake to Blaze's body. It was located approximately one quarter of a mile from the mobile home of defendant's mother. Upon returning to the sheriff's office, Ward took another statement from defendant, this one concerning Blaze's murder. Again, before giving the statement, Ward administered Miranda warnings, and the defendant waived her rights.

At the conclusion of this interview, Ward left her office to confer with Captain Abraham. When Ward returned to the office, she observed that the cassette tape of the most recent interviews, which she thought she had labeled, now appeared blank. Ward then learned that after she left her office, defendant left the interview room to use the restroom. Accompanied by Officer Hostnick, Ward entered the women's restroom where she found the cassette in the garbage can; the label had been peeled off and the recording tape had been removed. Ward later learned that two of the waiver of rights forms defendant had executed had also been destroyed. When Ward asked the defendant if she would give another statement, defendant responded that she was tired. Defendant later admitted to

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[18] As discussed infra, while Ward attempted to locate Wright, Captain Bobby Abraham confronted defendant about her allegation that Wright committed the murder. At this point, the defendant responded with a second story about the murders, claiming that she committed the violent entry into the Brandon home with her boyfriend, Robert Coleman, and that she shot both Reverend and Mrs. Brandon.

Captain Abraham that after Ward had left the room, she had opened the drawer where the blank cassette tapes were kept and substituted a blank tape for the one she had destroyed and left in the bathroom. At that time, Ward also observed defendant was no longer wearing a bracelet and ring (presumably stolen from the Brandons' residence) which she had worn earlier during the first interview.

At 8:26 a.m., the defendant gave another statement to Ward. Again, defendant gave no indication she did not want to talk or exercise any of her Miranda rights. In this statement, the defendant claimed she went to the Brandons' residence with Johnny Wright after she told him she needed money to return to Mississippi. After Reverend Brandon opened the door, Wright burst into the home and shot him. Defendant then demanded account numbers from Mrs. Brandon and later tried to shoot her, but the gun jammed; ultimately, Wright shot her as well. Defendant saw Mr. Brandon getting up and retrieved a knife and "cut" him. She also maintained that Coleman was at her mother's house during the violent entry into the Brandon home and murder and had no idea that she and Wright were committing the offense. Defendant was subsequently booked into the Caddo Correctional Center ("CCC").

The following day, Ward, accompanied by Detective Jeff Ivey contacted the defendant. She executed yet another waiver of rights form before making a final statement. An underlying theme of this statement was that the detectives claimed to know that defendant's brother, Sean George, was present at the Brandon crime scene, a fact she adamantly and repeatedly denied. However, the allegations clearly upset defendant, so much so that she exposed Coleman's participation again. The detectives also focused considerable attention on the

gun and tried to ascertain its location; the detectives' attempts were fruitless. The statement concluded with defendant's gratuitous (and apparently false) announcement that she was pregnant. Ward made it clear that throughout her multiple contacts with defendant, at no time did anyone threaten or coerce the defendant. She further stated the defendant never asked for an attorney and was provided with the opportunity to eat, drink and use the restroom.

Corporal Sheila Hostnick also testified at the suppression hearing and corroborated Ward's testimony concerning the defendant's initial interview and similarly identified the waiver of rights form the defendant executed. Like Ward, Hostnick testified the defendant was very cooperative and she was neither threatened nor coerced into making any statement. Hostnick also described leaving the sheriff's office to locate Johnny Wright and returning some time later only to learn that defendant had given a different statement about the crime to Captain Abraham. In that statement, the defendant provided information about the Blaze homicide. Hostnick did not accompany the defendant and Ward to the Blaze crime scene. However, much later that morning, she transported the defendant to the Caddo Correctional Center, where the defendant was charged with murder.

Also testifying at the motion to suppress hearing was Sergeant Gary Frake.[19] Frake accompanied Detective Ward and the defendant to the Terrance Blaze crime scene. Later, after Ward

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[19] He further testified that he first encountered the defendant when he asked to take a photo of the soles of her shoes during the interrogation to determine whether they matched footprints found at the Brandons' residence.

had left her office to confer with Captain Abraham, defendant asked Frake if she could use the bathroom. After Ward later informed him that she suspected that the cassette tape used to record the most recent interview was missing, Frake told her that he had heard the toilet flush several times while the defendant was in the restroom. At no time during the investigation did Frake observe anybody threaten, coerce or make promises to the defendant.

Captain Bobby Abraham supervised the investigation and testified that based on information defendant had given other officers during the initial interrogation, Ward, Hostnick and Bradford left the sheriff's office to locate suspect Johnny Wright. While the other officers were looking for Wright, Abraham entered Ward's office and approached defendant, telling her that he did not "quite believe the story that she had told Detective Ward and Hostnick earlier." Trial Tr., vol. XIX, p. 4115 (July 21, 2005). Defendant then told Abraham that she participated in the violent entry into the Brandon home with both Wright and her boyfriend, Coleman. Defendant continued that after she brandished a pistol to shoot Reverend Brandon, she shot him when he wrestled with her for control of the gun. Defendant claimed she and Coleman then confronted Mrs. Brandon; after taking two of her credit cards, the defendant placed a pillow over Mrs. Brandon's head and shot her as well. When defendant heard Reverend Brandon was still breathing, she went to the Brandons' kitchen where she armed herself with a knife and cut his throat. Defendant then said she exited through the rear door of the Brandons' residence and unsuccessfully attempted to use their credit cards at a neighborhood Hibernia Bank. Defendant told him she later burned the credit cards and left them off of Roy Road. Defendant then told

Abraham that he would be "shocked" when she took him to the area where she had burned the credit cards because "there was another body at that location also." Id., pp. 4117-18. Because Abraham was responsible for supervising the investigation, rather than conducting interrogations, he did not record this interview, but exited Ward's office and requested that Lieutenant Bill Duncan return to the office with him. In Duncan's presence, the defendant then gave substantially the same statement about the murder albeit going "into a little more detail as to what happened." Id. Abraham explained:

> . . . . She went into more detail about where Mr. Brandon was when she cut him and when she shot him on the floor area of the house.
>
> The only other difference was she told us that when she shot Mrs. Brandon, that the first time she pulled the trigger, the gun jammed. And she showed a motion and showed us how she racked the gun back and shot Mrs. Brandon that time. And the second time is when she put the pillow over her face. Other than that, it was the same.

Id., p. 4118.

This statement, too, was not recorded.[20] Abraham stated that before he confronted defendant, Ward had informed him that she had administered

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[20] Lieutenant Duncan corroborated Abraham's testimony concerning the circumstances of this statement. Trial Tr., vol. XIX, p. 4130 (July 21, 2005).

Miranda warnings. Moreover, Abraham stated the defendant personally confirmed to him that she had been advised of her rights.

Abraham also testified about confronting the defendant regarding the cassette tape she had destroyed in the bathroom after temporarily being left alone in Ward's office. Defendant initially blamed Ward for the tape's destruction because the detective "knew I was a criminal when she left the tape in the office here with me." Id., p. 4120. The defendant then explained to Abraham that after observing Ward leave the cassette with her incriminating statement on the desk, she (defendant) replaced it with a blank tape from inside the officer's desk drawer and then took the original tape to the bathroom, where she destroyed it.

Abraham testified he never observed the defendant being threatened or coerced before making her statement to him. Rather, he opined she may have been motivated to confess out of concern for her mother and brother. Before making her statement to him, the defendant told Captain Abraham that neither family member was involved in anything to do with the homicide; consequently, the defendant urged Abraham to allow them to go home. Abraham responded that if that was true, he would permit them to leave, but that defendant would have to "tell . . . what happened." Id., p. 4121.

After hearing the detailed testimony about the defendant's various statements, the trial court denied the defendant's motion to suppress. Addressing the defendant's allegations, the trial court stated:

> The fact of the matter is that, and the evidence clearly shows, that Ms. Holmes was advised of her rights,

her constitutional rights in accordance with the Miranda decision at the very outset. And then she was also readvised numerous times throughout the interviews with her. I believe that she had a sufficient understanding of her rights and I believe that she intelligently waived her Fifth Amendment right to remain silent . . . .

. . . [I]t is alleged by defense that inculpatory statements made by her while in custody were obtained through interrogation after she invoked her Fifth Amendment right to remain silent and her Sixth Amendment right to have the assistance of counsel. There is absolutely no evidence whatsoever to suggest that at any point she invoked her Fifth Amendment right to remain silent, and at no time did she invoke her right to have assistance of counsel. Edwards versus Arizona clearly doesn't apply. . . .

Specifically in listening to the testimony and evidence in this case, I conclude that Detective Kay Ward with the Caddo sheriff's office, Corporal Sheila Hostnick, Sergeant Gary Frake, Captain Bobby Abraham, and Lieutenant Duncan are all credible witnesses; and I accept their testimony as truthful.

Id., pp. 4137-38.

The trial court further concluded that defendant's act of destroying the cassette tape in which she made her most inculpatory recorded statement and the waiver of rights forms belied any inferences that the investigating officers used undue force or coercion. In fact, the trial court found that "officers did not exert enough supervision and control over Ms. Holmes during the interrogation process," which led to her "deceptive acts, taking the tapes and the rights forms going to the bathroom, going into that room unattended and destroying the evidence." Id., p. 4139. The trial court also countenanced any misrepresentations made by detectives concerning the physical evidence they possessed, stating that "deceptiveness as an interrogation tactic and interrogation strategy is not illegal and it's not improper." Id. In light of the testimony and the documents introduced at the hearing, the trial court concluded there was "absolutely no evidence" to support the allegations in the motion to suppress. Id., p. 4140.

After carefully examining the arguments of counsel, we find the record and the law fully support the trial court's ruling. As an initial matter, we observe both the signed waiver of rights form and testimony from both Ward and Hostnick demonstrated the defendant had been administered Miranda warnings and waived her Miranda rights. No requirement exists for the State to advise a defendant that she was a suspect in a first-degree murder for her to execute a knowing waiver of rights. See, e.g., Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Miranda warnings alone sufficiently apprise the defendant of his Sixth Amendment right to counsel and of the consequences of abandoning that right; no additional or refined warnings needed in this context); cf. La.

Code Crim. Proc. art. 218.1 (when a person has been arrested, the police must advise him "fully of the reason for his arrest or detention . . . .").

Moreover, while not dispositive of the issue of whether the defendant's confession was illegally coerced, the fact that the investigating officers administered Miranda warnings several times during the interrogation militates in favor of the State's assertion that the defendant's confessions were voluntarily given. See e.g., United States v. Huerta, 239 F.3d 865, 871-72 (7th Cir. 2001) (confession voluntary in part because defendant received Miranda warnings three times and executed written waiver); Rook v. Rice, 783 F.2d 401, 404-05 (4th Cir. 1986) (confession voluntary despite defendant's low intelligence, 7th grade education, and statement by police that "the only thing that could help him was to tell the truth" because he was given Miranda warnings twice and indicated that he understood them).

Furthermore, despite the defendant's appellate claim that her low intelligence rendered her wavier of rights and subsequent statements involuntary, well established jurisprudence from this state shows otherwise. See e.g., State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 278-84 (La. 1995) (mildly retarded defendant's waiver of rights was knowing and intelligent, even though psychologist testified defendant was unable to comprehend his rights; psychologist also testified defendant was educable and could be made to understand rights, police officers testified defendant understood his rights in part because of his prior criminal history); State v. Istre, 407 So. 2d 1183, 1186-87 (La. 1981) (19-year-old who had IQ of 68 and who did not know his own age intelligently waived rights, which were explained in simplistic terms that he apparently

understood); see also State v. Brown, 414 So.2d 689, 696 (La. 1982) ("'[M]oderate mental retardation and low intelligence or illiteracy do not of themselves vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession.'") (citations omitted).

Turning now to the defendant's contention that she confessed to Abraham only to obtain the release of her mother and brother, the record clearly shows the officer testified that he truthfully told her merely that if, indeed, these family members played no part in the murder, that they could return home. Furthermore, we note that a paramedic who responded to the crime scene reported that Mrs. Brandon had indicated two Caucasian persons were responsible for the attack; Coleman, defendant's co-defendant, is African American. Thus, the record supports that it was at least possible at that point of the investigation that Detective Ward suspected that defendant's brother had played a role in the offense. Moreover, the record further shows Detective Ward had previously investigated the defendant and her brother in connection with a burglary in the neighborhood.

Considering the above stated factual scenario and notwithstanding the defendant's motive for her confession, appellate courts have consistently held that "confessions given in response to exhortations to consider the health, well-being and liberty of close relatives are admissible." State v. Massey, 535 So. 2d 1135, 1141 (La. App. 2 Cir. 1988) (citing State v. Baylis, 388 So. 2d 713, 716 (La. 1980); State v. Weinberg, 364 So. 2d 964, 970 (La. 1978)).

Finally, even assuming that Ward and Ivey knowingly lied when they insisted that they had evidence placing the defendant's brother inside the Brandons' residence, such interrogation techniques

have been consistently upheld. See Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1425, 22 L.Ed.2d 684 (1969) ("fact that the police misrepresented [a co-perpetrator's] statements" held "insufficient . . . to make [an] otherwise voluntary confession inadmissible."); Hawkins v. Lynaugh, 844 F.2d 1132 (5th Cir. 1987) (mere "trickery" alone will not necessarily invalidate a confession); State v. Sanford, 569 So. 2d 147, 152 (La. App. 1 Cir. 1990), writ denied, 623 So.2d 1299 (La. 1993) (same); State v. Horton, 479 So. 2d 528, 530 (La. App. 1 Cir. 1985), writ denied, 493 So. 2d 1215 (La. 1986) (holding a confession free and voluntary despite impetus the police provided when officers informed defendant that an accomplice had implicated defendant in murder); see also Miriam S. Gohara, A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques, 33 Fordham Urb. L.J. 791, 805-06 (2006) ("Few federal courts have circumscribed the use of specific deceptive interrogation techniques, and only in rare cases have federal courts deemed deceptive interrogation practices coercive. . . . Interrogations employing false or fabricated evidence where interrogators have misled suspects to believe that police possessed inculpatory evidence, including physical evidence or accomplices' confessions have generally been held to be voluntary."). After thoroughly reviewing the record and the defendant's contentions, we find the defendant has not established any basis for suppression of her multiple statements.

GUILT PHASE: STATE'S MOTION IN LIMINE
(Assignment of error 12)

The defendant next argues the trial court erred when it granted the State's motion in limine to prevent her from introducing any evidence of mental deficit or fetal alcohol syndrome (FAS) at the guilt phase. After hearing oral argument on the issue, the trial court granted the State's motion. Explaining its ruling, the trial court stated:

> It is clear that Ms. Holmes has tendered a plea of not guilty. Period. She has not pled not guilty and not guilty by reason of insanity. Accordingly, she may not introduce evidence of insanity or mental defect at the time of the offense during the guilt phase.

Trial Tr, vol. XIX, p. 4259 (Nov.10, 2005).

In her motion for a new trial, the defendant revisited the trial court's earlier ruling, alleging she should have been permitted to introduce evidence of diminished mental capacity, specifically evidence that she suffered the effects of FAS. The defendant premised her argument on the claim that the exclusion of this evidence during the guilt phase denied her the right to present a defense by introducing "evidence which would have allowed her to counter and explain the State's evidence against her, including but not limited to her confessions and/or statements to various law enforcement officers." Trial Tr., vol. XVIII, p. 3957 (Feb. 21, 2006). Defendant further claimed the trial court's ruling permitted the State "to use her mental defects against her, while preventing defendant from either testifying or presenting any evidence to explain her appearance, mannerisms and lack of understanding

of any abstract concepts." Id. In its ruling denying the new trial motion, the trial court restated that "there is no entitlement by defense, again, to present evidence during the guilt phase of fetal alcohol syndrome." Trial Tr, vol. XXX, p. 6267 (Feb. 21, 2006).

In argument to this Court, the defendant claims that given her penchant for story telling and exaggeration, evidence that she suffered from FAS could have explained her "susceptibility to manipulation, her inability to distinguish the truth from lies, and inappropriate expressions and behavior due to her limited capacity to understand what is appropriate in any given situation." Brief for the Appellant, p. 41. La. Code Crim. Proc. art. 651 provides in part: "When a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible." Under La. Rev. Stat. § 14:14, the Louisiana codification of the M'Naughten rule,[21] an offender is exempt from criminal responsibility only if he is incapable of distinguishing between right and wrong with reference to the conduct in question. As a result, evidence of a mental defect which does not meet the M'Naughten definition of insanity cannot negate a specific intent to commit a crime and reduce the degree of the offense. See State v. DeBoue, 552 So. 2d 355, 366 (La. 1989), cert. denied, 498 U.S. 881, 111 S.Ct. 215, 116 L.Ed.2d 174 (1990) (while not claiming insanity at commission of the murders, defendant argued in vain that mental retardation rendered him incapable of forming specific intent for aggravated burglary of the murder victims' home); State v. Nelson, 459 So. 2d 510, 516-17 (La. 1984), 471 U.S. 1030, 105 S.Ct. 2050, 85

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[21] McNaughten's Case, 1 Car. & K. 130 (1843).

L.Ed. 2d 322 (1985) (no error disallowing defense questions to psychiatrist designed to show the accused's mental defect falling short of M'Naughten); State v. Lecompte, 371 So. 2d 239, 245 (La. 1979) (on reh'g) ("The real danger in permitting psychiatric evidence of mental or emotional disorders short of insanity to negate intent is to practically destroy the M'Naughten rule and to clutter practically every trial with some sort of expert opinion evidence as to whether the defendant possessed the requisite intent . . . .").

Notwithstanding the operation of article 651 of the Code of Criminal Procedure, we have repeatedly recognized a defendant's constitutional right to present a defense. See State v. Van Winkle, 94-0947 (La. 6/30/95), 658 So.2d 198, 201; State v. Gremillion, 542 So.2d 1074, 1078 (La. 1989); State v. Vigee, 518 So.2d 501, 503 (La. 1988); State v. Shoemaker, 500 So.2d 385, 389 (La. 1987); State v. Vaughn, 431 So.2d 358, 370 (La. 1982) (on reh'g). Against that jurisprudential backdrop, there exists some jurisprudential support for the defendant's claim she should have been allowed to introduce evidence concerning FAS or her diminished mental capacity for the limited purpose of challenging and/or explaining aspects of her various statements.

In State v. Whitton, 99-1953 (La. App. 4 Cir. 9/27/00), 770 So.2d 844, the Fourth Circuit found the trial court erred when it excluded evidence that the defendant suffered from blackouts caused by substance abuse to challenge the voluntariness of his confession. Specifically, the defendant maintained he had been truthful when he initially told police that he did not recall committing the multiple murders and had later been supplied with the facts that he related in his confession by police both before and during his recorded statement. Relying on dicta from

this Court's opinion in State v. Van Winkle, 658 So.2d at 203 (suggesting that the trial court erred when excluding evidence of the defendant's mental state during her various inculpatory statements) and La. Code Crim. Proc. art. 703(G),[22] the Whitton court held that "some evidence of mental defect may be admissible when it concerns the circumstances surrounding the making of a confession in order to enable the jury to determine the weight to be given the confession." Id., 770 So. 2d at 854. See also Crane v. Kentucky, 476 U.S. 683, 689, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986)("[R]egardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubts on

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[22] In pertinent part, Art. 703(G) provides:

> When a ruling on a motion to suppress a confession or statement is adverse to the defendant, the state shall be required, prior to presenting the confession or statement to the jury, to introduce evidence concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.
>
> A ruling made adversely to the defendant prior to trial upon a motion to suppress a confession or statement does not prevent the defendant from introducing evidence during the trial concerning the circumstances surrounding the making of the confession or statement for the purpose of enabling the jury to determine the weight to be given the confession or statement.

its credibility."); State v. Williams, 01-1650 (La. 11/1/02), 831 So.2d 835, 843 (holding that the statutory rule of La. Code Crim. Proc. art. 703(A) which permits the defendant to introduce evidence at trial as to the circumstances surrounding his confession "has its underpinnings in the Due Process Clause and it necessarily operates independently of any credibility determinations the trial court made in ruling on the voluntariness of the statement as a matter of law.").

Nonetheless, we hasten to add that the erroneous exclusion of this evidence is subject to the harmless error standard of review. In Crane, supra, a capital case in which the defendant's sole defense was that there was a lack of physical evidence to link him to the crimes and that, for a variety of reasons, his earlier admission of guilt was not to be believed, the United States Supreme Court found the erroneous exclusion of the defendant's testimony regarding the circumstances of his confession fell under harmless error review standards. More recently, in State v. Blank, 04-0204 (La. 4/11/07), 955 So. 2d 90, 133, cert. denied, ___ U.S. ___, 128 S.Ct.494, 169 L.Ed. 2d 346 (2007), we found the trial court erred when it overruled the defendant's objection to redacting portions of his confession as it included information revealing that he had been administered a polygraph examination, and not allowing the defendant to examine the agent who administered the polygraph at trial to support his claim that his confession was unreliable as a result of coercive interrogation techniques. Nonetheless, we concluded in Blank that because the transcript of the interrogation did not support the claim that the defendant's confession was coerced and because defendant consistently denied his involvement in the murder to the agent who administer the polygraph

examination, the excluded evidence would not have caused the jury to disregard defendant's subsequent lengthy and detailed confession and the trial court's error was thus harmless. Id., 955 So.2d at 134-36.

In the present case, although evidence of defendant's diminished mental capacity and diagnosis of FAS may have helped explain her susceptibility to manipulation and disinterested demeanor at trial, such evidence would have done nothing to diminish the evidence demonstrating that at a minimum, she acted as a principal to the first-degree murder of the victim. Independent of defendant's statements, the State's crime scene reconstruction expert Lieutenant Mark Rogers corroborated large portions of the defendant's statements. Moreover, as discussed supra, considerable circumstantial evidence presented at trial demonstrated her guilt. Accordingly, even assuming the trial court should have admitted evidence of the defendant's mental deficiency to help explain the circumstances of her various statements to police, exclusion of the evidence was harmless. Defendant's assignment of error lacks merit.

VOIR DIRE

(Assignments of error 16 - 18)

In these assignments, the defendant claims that reversal of her conviction and death sentence is required because of a trial court ruling on a challenge for cause during voir dire and because the trial court limited the scope of voir dire examination adversely to the defendant. Initially, the defendant maintains the trial court improperly granted a State challenge for cause to prospective juror Veronica Ivy because her responses during voir dire revealed she was not morally opposed to returning a death

verdict. Defendant also claims the trial court improperly limited the scope of voir dire when it did not allow counsel to examine jurors in depth about whether they could consider FAS as a mitigating circumstance at sentencing.

Challenge for cause

A trial court is vested with broad discretion in ruling on challenges for cause and its rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. State v. Cross, 93-1189 (La. 6/30/95), 658 So. 2d 683, 686-87; State v. Robertson, 92-2660 (La. 1/14/94), 630 So. 2d 1278, 1280. "[A] challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably [inferred]." State v. Hallal, 557 So. 2d 1388, 1389-90 (La. 1990).

The proper standard for determining when a prospective juror may be excluded for cause because of his/her views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed. 2d 841 (1985); State v. Sullivan, 596 So. 2d 177 (La. 1992), rev'd on other grounds sub nom. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993). The basis of exclusion under La. Code Crim. Proc. art. 798(2)(a), which incorporates the standard of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), as clarified by Witt, is that the juror "would automatically vote against the imposition of capital punishment

without regard to any evidence that might be developed at the trial of the case before him . . . ." Witherspoon further dictates that a capital defendant's rights under the Sixth and Fourteenth Amendments to an impartial jury prohibits the exclusion of prospective jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Id., 591 U.S. at 522, 88 S.Ct. at 1777.

In the present case, the State only exercised six of its peremptory challenges. Accordingly, the State first argues that even assuming the trial court erred when it excluded the juror for cause based on her perceived inability to vote for the death penalty, the trial court's error was harmless.

La. Code Crim. Proc. art. 800(B) provides that a defendant cannot complain of an erroneous grant of a challenge to the State "unless the effect of such a ruling is the exercise by the state of more peremptory challenges than it is entitled to by law." Notwithstanding this provision of article 800(B), the United States Supreme Court has consistently held that it is reversible error, not subject to harmless-error analysis, when a trial court erroneously excludes a potential juror who is Witherspoon-eligible, despite the fact the State could have used a peremptory challenge to strike the potential juror. Gray v. Mississippi, 481 U.S. 648, 664, 107 S.Ct. 2045, 2054, 95 L.Ed. 2d 622(1987); Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1979). Thus, under United States Supreme Court jurisprudence, the State's failure to exhaust its peremptory challenges does not obviate the need to review the merits of the defendant's claim.

At the outset, in response to the State's inquiry about her "feelings" about capital punishment, Veronica Ivy stated, "I'm for the death

penalty, but I prefer not to be the one who has to impose it." Trial Tr., vol. XXI, p. 4435 (Feb. 7, 2006). Later, when the State asked if she could return a vote for death, she then answered, "I don't know." Id., p. 4436.

Classifying Ivy "as a theoretical supporter of the death penalty" who "may not be able to impose it herself," the trial court called her for individualized voir dire. Id., p. 4470. She then repeated to the State that she would "prefer not" to serve on a capital jury, explaining, "I don't want to be the one to have to make that decision. That's hard making judgment on someone else's life, determine a life." Id., p. 4471. After making several other comments suggesting she did not know whether she could vote for death, the State asked, "If it comes down to it, can you go back and vote with those other people to impose a death penalty on another person that you've been looking at for two weeks?" Id., p. 4473. Ivy responded, unequivocally, "No." Id. In response to defense counsel's questions, Ivy vacillated again, stating it would not be "impossible" for her to vote for death but that she "would prefer not" to have to make that decision. Id., pp. 4473-74.

After hearing argument on the issue, the trial court granted the State's cause challenge to Ivy, with the following observations:

> Ms. Ivy stated basically different things at different times. I believe that she fits in a category established by the jurisprudence as a theoretical supporter of the death penalty. But I believe, based on the totality of her answers, that she is not one who can impose it. She said, quote, I don't know if I could do it. She said, I prefer not to do it. She

said, I don't want to be the one to do it. I don't want to judge. Who am I to judge? I would have to live with that. She voiced a religious foundation for her viewpoints. She said, I didn't believe in judging.

And I place great stock in her answer which was concise and to the point of no when asked by Mr. Holland as his last question whether or not she could vote to impose the death penalty. She said emphatically, no. She equivocated before. She equivocated after. But her clear and concise answer to Mr. Holland's question was no.

I examined her demeanor very carefully. I think she has wrestled with this issue. I think she's troubled by the possibility of her being called upon to consider and apply the law regarding the punishment issues in a death penalty case, in a first degree murder case. And based on what I have observed by her demeanor, what I infer about her feelings and her tone and everything about her demeanor, coupled with her answer to Mr. Holland that I referred to, I believe that the cause challenge by the State has merit and is accordingly granted.

* * *

I think she'd be an excellent, splendid juror for other cases, but not for a capital case.

Id., pp. 4476-77.

Our review of the record and the jurisprudence shows the trial court's ruling was correct. Although Ivy stated she theoretically supported the death penalty, she repeatedly indicated she would prefer not to make that decision. Indeed, as borne out by the transcript of her voir dire examination, it is clear she vacillated considerably when asked whether she could vote for the death penalty. We find it telling that at one point, she unequivocally responded in the negative when asked if she could impose the death penalty upon an actual person that she had been looking at for two weeks. In these circumstances, we find the defendant fails to show the trial court abused its discretion when it granted the State challenge for cause. See State v. Williams, 96-1023 (La. 1/21/98), 708 So. 2d 703, 713, cert. denied, 525 U.S. 838, 119 S.Ct. 99, 142 L.Ed. 2d 79 (1998) ("Although Ms. McAdams and Ms. Lewis were theoretical supporters of the death penalty, a full reading of the voir dire clearly indicates they could not have imposed the penalty in this case."); cf. State v. Frost, 97-1771 (La. 12/1/98), 727 So.2d 417, cert. denied, 528 U.S. 831, 120 S.Ct. 87, 145 L.Ed. 2d 74 (1999) (jurors properly dismissed for cause when age of defendant would have impaired their ability to return the death penalty).

Scope of voir dire

Defendant also claims the trial court erred when it denied her the opportunity to examine prospective jurors concerning their ability to consider FAS as a mitigating circumstance.

At the commencement of voir dire, the State made an oral "motion in limine prohibiting the use

by defense of the specific term fetal alcohol syndrome or fetal alcohol disorder" arguing that counsel "is entitled to voir dire at length on the law of the case but not entitled to preview their specific defenses." Trial Tr., vol. XX, p. 4278 (Feb. 6, 2006). The trial court responded that its inclination was to allow the defense to ask jurors if they could consider fetal alcohol syndrome as a mitigating circumstance, but that "to go into it otherwise is inappropriate." Id., p. 4279. The trial court later clarified its ruling, stating:

> [T]he defense can ask the prospective juror if they have ever heard of the term fetal alcohol syndrome. Whether they can consider that along with any other relevant mitigating circumstance.
>
> * * *
>
> I think it's inappropriate for the defense to ask really anything else. I believe that any description of it is unnecessary and inappropriate.

Id., p. 4335.

Defense counsel objected to the trial court's ruling. He then renewed the request to educate jurors about the condition following the examination of the first panel of jurors, stating:

> Your Honor, I just would like to reurge the ability to question the jurors more so on the fetal alcohol syndrome. As we see from this first panel, it seems

> like everybody has heard of it oddly enough, but that many don't really realize what it is. Some are even asking or making statements like they heard of it in children but they never have in an adult, as if somehow the brain could somehow get better or fix itself. So I think there is a lack of understanding. If I can't go into that in more detail, then I may just be stuck with that. I'm getting back from the jury they heard of it, but they really don't know what it is or how insidious it is.

Id., p. 4390.

The trial court denied the request, stating:

> I believe that you've had ample opportunity to ask jurors whether or not they can consider fetal alcohol syndrome as a mitigating circumstances and factor. I think you've gotten answers. I believe that request shall be denied. I think that has been gone into quite enough. And I think that obviously at the right time, you will have all the time you need to present any and every mitigating circumstance in detail.

Id., pp. 4390-91.

La. Const. art. I, § 17 guarantees a defendant full voir dire examination of prospective jurors and the right to challenge jurors peremptorily. The purpose of voir dire is to determine qualifications of prospective jurors by testing their competency and

impartiality in order to discover bases for challenges for cause and for the intelligent exercise of peremptory challenges. State v. Hall, 616 So. 2d 664, 668 (La. 1993). Nonetheless, the scope of examination rests within the sound discretion of the trial court, and its ruling will not be disturbed absent clear abuse. La. Code Crim. Proc. art. 786; Hall, 616 So.2d at 669. In determining whether the trial court afforded a sufficiently wide latitude to the defendant, the entire voir dire examination must be considered. Id.

Louisiana law clearly establishes that a party interviewing a prospective juror may not ask a question or pose a hypothetical scenario which would demand a commitment or pre-judgment from the juror or which would pry into the juror's opinions about issues to be resolved in the case. "It is not proper for counsel to interrogate prospective jurors concerning their reaction to evidence which might be received at trial." State v. Williams, 89 So. 2d 898, 905 (La. 1956). See also State v. Vaughn, 431 So. 2d 358, 360 (La. 1983); State v. Square, 244 So. 2d 200, 226 (La. 1971) ("Voir dire examination is designed to test the competence and impartiality of prospective jurors and may not serve to pry into their opinions concerning evidence offered to be offered at trial."), judgment vacated in part, 408 U.S. 938, 92 S.Ct. 2871, 33 L.Ed.2d 760 (1972), mandate conformed to, 268 So.2d 229 (La. 1972); State v. Smith, 45 So. 2d 617 (La. 1950) (hypothetical questions and questions of law are not permitted in the examination of jurors which call for a pre-judgment of any supposed case on the facts).

In the case sub judice, the trial court's ruling limiting voir dire did not prejudice defendant. The trial court permitted the defense to question jurors about their ability to consider defendant's mental

deficiencies, allegedly caused by FAS, as a mitigating factor during the penalty phase. As argued by the State, it is inappropriate to allow the defense "to use voir dire to indoctrinate jurors regarding a complex medical subject about which experts will testify later, or to obtain a guarantee that the juror will use that mitigating circumstance to ensure that a death sentence will not be returned." Brief for the Respondent, p. 50. In summation, we find the defendant fails to show the trial court erred in its rulings during voir dire. Thus, the defendant's assignments of error lack merit.

PENALTY PHASE: OTHER CRIMES EVIDENCE

(Assignments of error 26 - 28)

In several related assignments of error, the defendant focuses on unadjudicated other crimes evidence the State presented at the penalty phase of her trial. As discussed more fully below, the State introduced evidence at the sentencing hearing that the defendant unsuccessfully attempted another violent home entry/robbery days before she and Coleman forced their way into the Brandons' residence and committed the robbery and murder there. The State also presented evidence concerning the defendant's involvement in the murder of Terrance Blaze days after the murder of Reverend Brandon.[23]

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[23] In Assignment of Error no. 25, the defendant also complained about the admission of evidence during the guilt phase of the murder of Terrance Blaze, as well as defendant's participation in gang activity. Because the defendant did not lodge a contemporaneous objection to that evidence, we treat that assignment of error in the appendix to this opinion and find that issue not properly before us.

The State claimed in its amended notice of intent to introduce the other crimes evidence that it would show that:

> (11) On or about the 27th day of December 2002, the defendant was involved in an attempt to gain entrance information, under false pretenses, to Nob Hill which is a gated community in Blanchard, Caddo Parish, Louisiana.
>
> (12) On or about the 27th day of December 2002 and the 30th day of December 2002, defendant was involved in attempts to gain entry, under false pretenses, into the home of Patricia Camp, with the intention to burglarize the residence and/or murder Ms. Camp.
>
> (13) The defendant was involved in the unadjudicated offenses surrounding the death of Terrance Blaze in Caddo Parish on or about January 4, 2003.

Trial Tr., vol. XVII, pp. 3599-600 (Jan. 27, 2006).

At the pretrial hearing on the admissibility of the evidence, the State presented the testimony of DA investigator Don Ashley concerning attempts that had been made by a woman calling 911 in an effort to obtain the gate code for Nob Hill.[24] He

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[24] Ashley also testified about defendant's involvement in the attempted burglary of a neighbor, Lori Hendricks

continued that the fraudulent effort to enter the gated community related to two subsequent attempts by defendant, on December 27 and December 30, to gain access to the home of Patricia Camp, a resident of Nob Hill. Camp subsequently identified the defendant from a photographic lineup as the individual who tried to gain entry into her home. Ashley continued that during the investigation of the present offense, the defendant:

> admitted going to Nob Hill and attempting to gain entry to that particular house. And had made the comment that had she gained entry, the same thing would have happened to her [Mrs. Camp] that happened to the Brandons.

Trial Tr., vol. XXVIII, p. 5861 (Feb. 14, 2006).

Ashley then testified about the defendant directing police to the body of Terrance Blaze during her interrogation about Reverend Brandon's murder and her subsequent inculpatory statements, including her written confession in her letter to the district attorney's office, demonstrating her involvement in that killing.

At the conclusion of the hearing, the trial court ruled evidence of the Blaze homicide admissible. The court stated:

> I am ready to rule with respect to the . . . Terrance Blaze evidence. That is evidence of unadjudicated conduct and

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Griffin. Ultimately, the State did not introduce any evidence of this incident at the penalty phase.

> it is clear that at this hearing I believe that this evidence that the district attorney wants to present is clear and convincing. I believe it is competent and reliable. I believe it has relevance and substantial probative value as to Brandy Holmes's character and propensities.
>
> * * *
>
> I believe that the confession by Ms. Holmes of the unadjudicated crime, that being the second degree murder of Terrance Blaze is admissible because it is competent and reliable and trustworthy in light of the all the other circumstances.

Id., p. 5873.

Regarding the attempted burglary of Camp's residence, the trial court held that the State could present evidence of the 9-1-1 recording for the jury. However, the court concluded that the jury could make up its own mind about whether the speaker was the defendant. The trial court then ruled admissible evidence that:

> on or about the 27th day of December, 2002, and the 30th day of December, 2002 defendant was involved in attempts to gain entry under false pretences [sic] into the home of Patricia Camp with the intention to burglarize the residence and or murder Ms. Camp.

Id., p. 5874.

At the penalty phase, the State introduced a recording of the 911 call into evidence. In addition, the 9-1-1 operator who took the call testified that the call originated from 3737 Roy Road, where the defendant had been staying. Patricia Camp, 73 years of age, testified the defendant rang her doorbell twice: the first time on December 27, 2002, asking for an individual named Theresa McGee; and the second time, a few days later on December 30, 2002, asking to use the telephone. Camp also testified she identified the defendant's picture from a photographic lineup. At trial, Camp made an in-court identification of the defendant as the person who had attempted to gain entry to her residence.

The State then presented testimony from Detective Kay Ward who stated the defendant admitted going to Camp's residence, "but the lady wouldn't open the door. And she stated in the interview that if the lady would have opened the door that they would have killed them." Trial Tr., vol. XXIX, p. 5928 (Feb. 15, 2006). The State then played that portion of the defendant's recorded interview with Ward for the jury.

CPSO Captain Bobby Abraham then testified that during his interrogation about the Brandon murder, the defendant told him she had burned the credit cards stolen from the home. When asked if she could take him to the location of the credit cards, the defendant told him they were on a dirt road near another dead body. The defendant then directed police to that location where they found the body of Terrance Blaze, who had been shot to death.

Forensic evidence showed a gunshot to the back of the head killed Blaze; the evidence further showed Blaze was killed when he was either sitting down or standing up. In her first statement about

the Blaze homicide, the defendant claimed he was killed by a gang member named "Marcus" because Blaze owed Marcus money for drugs. The defendant stated that Marcus had threatened her with a gun and forced her to drive his (Marcus's) vehicle and then pick up Blaze. Blaze entered the passenger side of the vehicle and Marcus confronted Blaze about the alleged debt from the backseat of Marcus's car. Marcus then shot Blaze in the back of the head.

Subsequently, DNA analysis revealed that Blaze's blood was found in defendant's mother's car. Mark Rogers, a crime scene analyst and an expert in blood stain spatter analysis, testified that circumstantial evidence suggested the defendant shot Blaze in the back of the head from the rear seat of the vehicle as he sat in the passenger seat while Coleman was in the driver's seat. Finally, Assistant District Attorney Ed Blewer then identified the letter the defendant wrote him in which she admitted that "she did shot and kill Terrance Blaze. . . ." Trial Tr., vol. XXIX, , p. 6011.

Initially, the defendant argues the State gave insufficient and vague notice of the other crimes evidence.

In State v. Hamilton, 478 So. 2d 123 (La. 1985), cert. denied, 478 U.S. 1022, 106 S. Ct. 3339, 92 L.Ed. 2d 743 (1986), we vacated the defendant's death verdict when it found the State introduced "entirely new evidence of another [unadjudicated] crime . . . in the case in chief in the penalty phase, without any notice whatsoever to defendant to be prepared to meet such evidence." Id. 478 So. 2d at 131. The Hamilton court concluded the notice provision of La. Code Crim. Proc. art. 720[25]25 should

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[25] La. Code 25 Crim. Proc. art. 720 provides in pertinent part:

apply also to the penalty phase in a bifurcated capital case. Id., 478 So.2d at 132. Nevertheless, in State v. Ward, 483 So. 2d 578 (La. 1986), cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 168 (1987), we found that a State response to a defense discovery request revealing that the State would rely on "defendant's prior criminal record," without more, constituted sufficient notice of the State's intention to introduce prior crimes evidence at the penalty phase. We then pointed out that:

> the notice required in the penalty phase is not as detailed as that required by C.Cr.P. 720 in the guilt phase and State v. Prieur, 277 So.2d 126 (La. 1973), because in the penalty phase there has already been a determination of guilt lessening the chance that the defendant will be tried for crimes other than those charged.

483 So. 2d at 588. See also State v. Rault, 445 So. 2d 1203, 1215 (La. 1985), cert. denied, 469 U.S. 873, 105 S.Ct. 225, 83 L.Ed.2d 154 (1986) (holding the trial court correctly allowed admission at penalty phase of evidence of defendant's other criminal activity, even when defense counsel claimed to have received no notice, when testimony of defense witness made it clear that the defense knew of the criminal activity, and defense did not articulate how notice would have changed its strategy).

> Upon motion of defendant, the court shall order the district attorney to inform the defendant of the state's intent to offer evidence of the commission of any other crime admissible under the authority of [La. Code Evid. art.] 404.

As discussed supra, in the present case the State provided written notice of its intent to introduce the other crimes evidence and the trial court held a hearing. Thereafter, the trial court determined that evidence of the attempted burglary of Camp's residence and Blaze's murder were admissible. At neither the hearing nor during the sentencing phase did the defense claim the State's notice misled it concerning the nature of the evidence it intended to present at the penalty phase. Accordingly, we find no merit to the defendant's claim concerning insufficient notice of the other crimes evidence.

The defendant further contends the trial court erred when it admitted evidence of the other crimes because the State failed to carry its burden of showing by clear and convincing evidence that she committed the offenses. La. Code Crim. Proc. art. 905.2 provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the impact that the death of the victim has had on family members." Jurisprudential rules have evolved governing the admission in penalty phase hearings of unrelated and unadjudicated crimes evidence to prove the defendant's character and propensities. In State v. Brooks, 541 So. 2d 801 (La. 1989), we approved the State's introduction in its case-in-chief in the penalty phase of two unrelated and unadjudicated murders after the trial judge made three determinations: (1) the evidence of the defendant's commission of the unrelated criminal conduct is clear and convincing; (2) the proffered evidence is otherwise competent and reliable; and (3) the unrelated conduct has relevance and substantial probative value as to the defendant's character and propensities. Brooks, 541 So. 2d at 814. In State v.

Jackson, supra, we granted a pre-trial writ of certiorari to establish limitations on the admissibility of unrelated and unadjudicated criminal conduct in capital sentencing hearings. Jackson also incorporated the three-pronged test from Brooks. Jackson, 608 So. 2d at 956. There, we ruled the evidence of the unadjudicated criminal conduct must involve violence against the person of the victim for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for capital murder. Jackson, 608 So. 2d at 955. Thereafter, we applied the limitations of Jackson in State v. Bourque, 622 So. 2d 198 (La. 1993). In Bourque, we held that evidence of an unrelated and unadjudicated killing, committed one hour before the murder at issue in the capital case being tried, was admissible, because it was relevant evidence of Bourque's character and propensities and fell within the limitation enunciated in Jackson. However, a majority of the Court reversed the death sentence on the basis that the State "presented a prohibited 'mini-trial' on the issue of the defendant's guilt or innocence of the killing of Jasper Fontenot," the unrelated and unadjudicated conduct. Id., 622 So. 2d at 248. Thus, the Bourque decision limited the amount of admissible evidence the State may introduce in the case-in-chief of the penalty phase, holding that anything beyond "minimal evidence" of the unadjudicated criminal conduct impermissibly shifts the focus of the capital sentencing jury from the character and propensities of the defendant to the determination of the guilt or innocence of the defendant with respect to the unadjudicated criminal conduct.

However, in State v. Comeaux, 93-2729 (La. 7/1/97), 699 So. 2d 16, cert. denied, 522 U.S. 1150,

118 S.Ct.1169, 140 L.Ed. 2d 179 (1998), we revisited the issue and held that Bourque's further limitation on the amount of admissible evidence, no matter how highly relevant to the defendant's character and propensities, was unnecessary to guarantee due process. We noted that the thrust of the Jackson decision was not to exclude any evidence that was significantly relevant to the defendant's character and propensities, no matter what the amount of the evidence was. Rather, we found the impetus for the Jackson decision was to maintain the jury's focus on its function of deciding the appropriate penalty by eliminating marginally relevant evidence that does not aid the jury in performing this function. Accordingly, we used Comeaux as a vehicle to provide guidelines to help determine whether character and propensity evidence is admissible at the penalty phase. We held that evidence which establishes that the defendant, in the recent past, "has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities. On the other hand, the type of evidence that tends to inject arbitrary factors into a capital sentencing hearing usually is evidence which is of only marginal relevance to the jury's determination of the character and propensities of the defendant." Id., 699 So. 2d at 16.

We have vacated death sentences in other cases in which we found the trial court admitted unreliable other crimes evidence at the penalty phase. See, e.g., State v. Hobley, 98-2460 (La. 12/15/99), 752 So. 2d 771, 781, cert. denied, 531 U.S. 839, 121 S.Ct. 102, 148 L.Ed. 2d 61 (2000) ("Absent extrinsic evidence linking defendant to the alleged crime, we cannot say that defendant's admission to the unadjudicated crime was [not] the result of braggadocio .... the state must show that the

confession was not the product of police coercion and that the crime actually occurred."); State v. Brooks, 92-3311 (La. 1/17/95), 648 So. 2d 366, 376 ("[T]he trial court erred in admitting at the penalty phase that part of Brooks' confession which contained references to multiple unadjudicated offenses not shown by clear and convincing evidence and not supported by competent and reliable evidence -- offenses which in fact may not have occurred.").

In stark contrast to the reversals just cited, our review of the record in the present case shows the trial court carefully considered the reliability of defendant's confessions to the other crimes, and found at the Jackson hearing that considerable circumstantial evidence corroborated the defendant's confessions. As detailed above, the record fully supports the determination that the State proved by clear and convincing evidence the defendant's involvement in the murder of Blaze and the ruse defendant employed in her attempt to gain entry into Camp's Nob Hill home. Accordingly, the defendant fails to show the trial court erred when it found the State presented the requisite proof she committed these other crimes.

Defendant further contends the State should not have admitted evidence of the Camp incident. The defendant premises her contention on three arguments: (1) she aborted her plan to commit the violent home entry when the intended victim refused to allow her access to the residence; (2) her conduct did not constitute a full-fledged attempt; and (3) this unadjudicated crime should have been found inadmissible under Jackson because it did not involve violence against the person of the victim for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for capital murder.

Our review of the record shows that at the very least, the State proved by clear and convincing evidence that defendant committed an attempted aggravated burglary.[26] This is fully supported through the defendant's admission concerning her intent when she went to Camp's house and that she surreptitiously tried to gain entry to the home on two separate occasions. Cf. State v. Lozier, 375 So. 2d 1333, 1337 (La. 1979)(holding that although unauthorized entry for purposes of La. Rev. Stat. § 14:60 is an entry without consent, express or implied, fraud or threat of force may violate consent when defendant gains entry to the victim's home under pretense that he was a police officer, the entry was unauthorized as the result of his misrepresentation). Moreover, the defendant's statement that she would have killed the occupants of the Camp residence was chillingly poignant evidence of her character and propensities, and constituted highly probative evidence for the jury to consider. Finally, even assuming the trial court should not have admitted evidence of this incident – it paled in comparison to the properly admitted evidence that defendant shot and killed Terrance Blaze days after the murder of Reverend Brandon – it certainly did not interject an arbitrary factor into the jury's deliberations at sentencing which would have rendered its verdict unreliable.

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[26] La. Rev. Stat. § 14:60 defines aggravated burglary in part as "the unauthorized entering of any inhabited dwelling . . . with the intent to commit a felony therein, if the offender is armed with a dangerous weapon." One is guilty of an attempt when she has the specific intent to commit the offense and does or omits an act for the purpose of and tending directly toward accomplishing her object. La. Rev. Stat. § 14:27.

PENALTY PHASE: UNADJUDICATED OTHER CRIMES; CROSS-EXAMINATION OF DEFENSE EXPERT

(Assignment of error 29)

In this assignment, the defendant contends the trial court erred when it allowed the introduction of otherwise inadmissible other crimes evidence during the cross-examination of Dr. Vigan, one of her expert witnesses at the penalty phase. The defendant called Dr. Vigan at the penalty phase and he testified about the results of neuropsychological testing he conducted and his suspicions that she may suffer from FAS. On cross-examination, the State first confirmed that Dr. Vigan had reviewed the defendant's medical and legal records. The State then received affirmative responses from Dr. Vigan when it asked if he learned when reviewing these records that: (1) "by age 12 or 13 Brandy Holmes was involved with a black street gang"; (2) "she was involved in drive-by shootings"; (3) "she was expelled from school for taking three knives to school"; (4) "she was involved in multiple burglaries"; (5) "she was in multiple escapes or attempted" escapes; and (6) "she and her boyfriend were involved in kidnaping a girl in Mississippi." Trial Tr., vol. XXX, pp. 6104-06 (Feb. 16, 2006). At that point, defense counsel lodged an objection, which the trial court overruled. The trial court then stated it would later assign reasons for the ruling.

The State then referred to a summary that Dr. Vigan prepared for the pre-trial hearing on the motion to quash and referred to diagnoses and notes of other mental health professionals over the years. First, the State pointed to information revealing that at thirteen years of age, defendant had been "combative and assaulted two personnel" at a

mental health facility. Id., p. 6107. Medical records further showed the defendant had been diagnosed at fifteen years of age with oppositional defiant disorder and conduct disorder. At seventeen years of age, a clinical psychologist noted "defendant was immature, narcissistic and self-indulgent." Id., p. 6109. At eighteen years of age, another doctor diagnosed defendant with "post traumatic disorder on axis one," and "borderline personality disorder with antisocial features on axis two." Id. The State then drew Dr. Vigan's attention to a report by Dr. George Seiden, who examined the defendant as a member of the sanity commission. After reviewing the report, Dr. Vigan stated that Dr. Seiden assigned the defendant with an axis two diagnoses of antisocial personality disorder and borderline intellectual functioning.

Following Dr. Vigan's testimony, the trial court explained its rationale for overruling the defense objection as follows:

> Let me say for the record that the district attorney can legitimately cross-examine[] a defense witness expert, specifically Dr. Mark Vigan, on the basis of his opinion which is that Ms. Holmes is antisocial. According to Dr. Vigan, she fits the criteria that he enumerated, and Dr. Vigan was asked about examples as to why she fit the criteria.
>
> It's my viewpoint that once the defense puts on a defense expert witness, that witness is subject to broad cross-examination on what that expert has reviewed and what that expert has

> considered, and that's pursuant to Article 703 and 705(B) of the Code of Evidence. Particularly in this proceeding, this phase of the case, the issue under law to a great extent is character and propensities of the defendant, and that's under Article 905.2 of the Code of Criminal Procedure.
>
> So I believe that on cross-examination, the prosecution is entitled to elicit the bases for the expert's various opinions about the defendant. I think to the extent it bears directly on character and propensities, it is most relevant and admissible in this hearing.

Trial Tr., vol. XXX, pp. 6150-51 (Feb. 16, 2006).

From the outset, we observe defense counsel failed to lodge an objection to the evidence until *after* Dr. Vigan answered the State's inquiries about the other crimes and thus waived any claim based on the testimony subject to Rule 28 review. La. Code Crim. Proc. art. 841; Wessinger, supra. Moreover, La. Code Evid. art. 705(B) provides that in a criminal case, while every expert witness must state the basis for his conclusion, if the evidence is otherwise inadmissible hearsay, it can be elicited during cross-examination.[27] Accordingly, the State was certainly entitled to ask Dr. Vigan questions about the

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[27] Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. La. Code Evid. art. 801(C).

medical records upon which he relied when he formulated his psychological evaluation of the defendant.

In any event, although the defendant makes several complaints about admission of testimony concerning the other crimes – specifically that it was irrelevant and unreliable, and that the State failed to give proper notice – even accepting these somewhat unconvincing allegations, it would not require us to vacate the defendant's death sentence. The references to the other crimes were extremely brief and mentioned only in relation to those documents Dr. Vigan had examined when diagnosing defendant. In contrast, the properly admitted evidence at the penalty phase demonstrated that in addition to the brutal murder for which she was convicted, the defendant had participated in Blaze's killing only days afterwards. In these circumstances, even assuming that admission of the crimes evidence during Dr. Vigan's cross-examination was improper despite defendant's failure to object, it did not interject an arbitrary factor into the jury's deliberations which would thereby render its verdict at the penalty phase unreliable. Accordingly, we find the defendant's assignment of error meritless.

EVIDENTIARY RULING: PLEA NEGOTIATION LETTER

(Assignment of error 29)

In this assigned error, defendant claims the trial court erred when it allowed the State to introduce a portion of the letter she wrote to Ed Blewer, an assistant district attorney, in which she admitted killing Terrance Blaze. The introduction of this letter occurred in the penalty phase.[28]

As an initial matter, although defendant claims on appeal that the trial court should not have admitted the letter because it was written in the course of plea negotiations, see La. Code Evid. art. 410,[29] the record shows the defendant did not object

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[28] The references to plea negotiations were redacted from the letter. Accordingly, as admitted the letter read:

> Mr. Ed Blewer, III, Good Evening Sir! . . . . Yes I did shot & kill Terrance Blaze, But only Because I was trheatting and Beatting up to do so. . . . Thank you and have a nice day.

Exh. P-32, vol. XXX, p. 6010 (February 15, 2006).

[29] La. Code Evid. art. 410 reads in pertinent part:

> A. **General rule**. Except as otherwise provided in this Article, evidence of the following is not, in any civil or criminal proceeding, admissible against the party who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for or other representative of the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn or set aside.

to introduction of the document on that basis. Rather, the defense counsel argued he should be allowed to withdraw from the case so that he could appear as a witness to explain the context in which the letter was written. Accordingly, subject to Rule 28 review, given this Court's settled rule that a new basis for an objection may not be urged for the first time on appeal, State v. Sims, 426 So. 2d 148, 155 (La. 1983); State v. Stoltz, 358 So. 2d 1249, 1250 (La. 1978); State v. Ferguson, 358 So. 2d 1214, 1220 (La. 1978), we find the defendant waived any claim based on admission of this evidence.

TRIAL COUNSEL'S MOTION TO WITHDRAW
(Assignment of error 30)

In this assignment, the defendant claims the trial court erred when it denied her counsel's motion to withdraw brought approximately one month prior to trial. The basis for defense counsel's motion was that he might have to testify to explain the context in which the letter that defendant sent the assistant district attorney was written. In the written motion and at the hearing, defendant's trial attorney, David McClatchey, explained the basis of his motion, stating that if the State introduced the letter in which defendant admitted to killing Blaze, he was "the only witness who could explain what actually transpired between counsel and client that resulted in the letters being sent and the misunderstanding that followed." Trial Tr., vol. XV, p. 3250 (Jan. 3, 2006); vol. XIX, pp. 4226-28 (July 21, 2005).

In response to the defendant's motion, the State agreed it would not introduce counsel's letter in which he made a plea offer to the State which prompted the defendant to contact the assistant district attorney herself. The State further agreed it

would redact any reference to plea negotiations in defendant's correspondence.

The trial court denied the motion to withdraw, stating that if defense counsel wanted to explain the context of the defendant's unsolicited correspondence to the State, "another lawyer with the Indigent Defender Office could probably provide that information . . . ." Id., p. 4232. The trial court also noted that it could provide an admonition to the jury regarding what consideration it should give to the evidence. Noting that trial had been scheduled to begin one month from the counsel's motion to withdraw, the trial court found it "totally inappropriate and unmerited . . . to relieve Mr. McClatchey" from the case. Id.

Defendant unsuccessfully re-urged this claim in her motion for a new trial. In its denial of the defendant's motion the trial court stated:

> Everything that Mr. McClatchey uses to form the basis for his objection was marked out. It was blocked through such that the jury would only read exactly what I just stated. Therefore, there was never the need for Mr. McClatchey to be available to testify about the other parts of that letter, which I think, if my memory serves me correctly, pertain to a plea offer by Ms. Holmes to plead guilty to first degree murder of the killing of Reverend Brandon.

Trial Tr., vol. XXX, pp. 6264-65 (April 27, 2006).

Defendant now contends the trial court's rulings denied her the opportunity to explain the

context in which the letter was written without compromising her Fifth Amendment right not to testify. She maintains that McClatchey was "the only witness who could explain, place in context and challenge, the most damning piece of evidence that the state used to prove its most damning assertion at the penalty phase; that Brandy Holmes shot and killed Terrance Blaze." Brief for the Appellant, p. 65.

Our review of the record shows that any reference to defense counsel's plea offer was redacted from the letter. Accordingly, the redaction of any reference to a plea offer made the defense counsel's testimony inessential because there would have been nothing to testify about concerning the context of the letter. We further note the record shows that defense counsel never objected to redaction of the reference to his offer of a plea bargain in the defendant's unsolicited correspondence to the assistant district attorney. As discussed above, the defendant did present the testimony of multiple experts at the sentencing phase to discuss her low intelligence and suspected FAS and these experts could have offered insight into defendant's comprehension of the charges at the time she authored the letter; such expert insight, however, was not forthcoming.

After carefully examining the record and the jurisprudence, we find the defendant neither shows the trial court abused its discretion when it denied her counsel's motion to withdraw, nor that she suffered resulting prejudice. See State v. Johnson, 406 So. 2d 569, 572 (La. 1981) (holding that the attorney's advising criminal defendant that the best course of action would be to plead guilty by way of plea bargain with State, advice that was properly given in light of abundance of evidence against defendant, was not the sort of actual conflict which

would prevent the attorney from rendering effective legal assistance to defendant). The defendant's assignment of error is meritless.

IMPACT EVIDENCE
(Assignments of error 20 - 24)

In these assigned errors, the defendant argues the trial court erred when it permitted the State to present improper victim-impact evidence. She contends this evidence interjected arbitrary factors in the jury's deliberations during sentencing, rendering its verdict of death unreliable.

La. Code Crim. Proc. art. 905 2 provides in part:

> The sentencing hearing shall focus on . . . the character and propensities of the offender, and the victim, and the impact that the death of the victim has had on family members, friends, and associates.

(Emphasis added).

As shown in the jurisprudence, two broad categories of victim-impact evidence may be admitted: (1) information revealing the individuality of the victim; and, (2) information revealing the impact of the crime on the victim's survivors. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed. 2d 720 (1991); State v. Taylor, 93-2201 (La. 2/28/96), 669 So. 2d 364, 369-70, cert. denied, 519 U.S.860, 117 S. Ct. 162 , 136 L.Ed. 2d 106 (1996); State v. Scales, 93-2003 (La.5/22/95), 655 So. 2d 1326, cert. denied, Scales v. Louisiana, 516 U.S. 1050, 116 S.Ct. 716,

133 L.Ed.2d 670 (1996)); State v. Martin, 93-0285 (La. 10/17/94), 645 So. 2d 190, cert. denied, 515 U.S. 1105, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995). Thus, some evidence depicting the impact of the loss on the victim's survivors is permitted. Notwithstanding, in State v. Bernard, 608 So. 2d 966 (La. 1992), we cautioned:

> In order to provide general guidance to trial courts in capital sentencing hearings, we reiterate that some evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or to the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime. However, introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of

> survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision. Whether or not particular evidence renders a hearing so fundamentally unfair as to amount to a due process violation must be determined on a case-by-case basis.

Bernard, 669 So. 2d at 972; see also State v. Taylor, 669 So. 2d at 370-371.

Turning now to the record of the present case, we note that at the pre-trial hearing on admissibility, the defendant objected to the presentation of a four and one-half minute videotape of Alice Brandon, the survivor of the defendant's attack. Defense counsel suggested the videotape did not address the impact of Mr. Brandon's death upon Mrs. Brandon, but instead depicted the physical injuries she sustained as a result of the defendant's crime. The defense also objected to the admission of Reverend Brandon's diplomas which showed he graduated from Centenary College and Southwestern Baptist Theological Seminary. At the conclusion of the hearing, the trial court admitted all of the victim-impact evidence the State sought to introduce, particularly testimony from Reverend Brandon's two daughters about their parents.

At the penalty phase, only two victim-impact witnesses testified. Julie Lloyd, the victim's youngest daughter, testified about her parents' livelihoods, her relationship with her parents, and their relationship with one another. She also identified several photos of the family, and finally,

discussed Reverend Brandon's diplomas. Dawn Finley, the victim's oldest daughter, described in detail her mother's injuries caused by the gunshot wound she sustained during the violent entry into her parents' home, stating she needed around-the-clock care. She then narrated the "day-in-the-life" video which depicted her mother's routine, including the insertion of feeding and tracheotomy tubes, procedures with which she was intimately familiar because of her medical background.

From the outset, we note that at the Bernard hearing the State clearly stated it had already edited the videotape of Mrs. Brandon before the penalty phase at Coleman's trial. The trial court similarly acknowledged that the video had been redacted to comply with the strictures of Bernard at the earlier trial.[30]

Although defense counsel correctly asserts that defendant was not on trial for the attempted murder of Alice Brandon, the defendant was charged with first-degree murder "[w]hen the offender has a specific intent to kill or to inflict great bodily harm

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[30] The trial court stated:

> And I will state for the record that I was presiding judge in State of Louisiana versus Robert Coleman. And I did ask the lawyers to work together to redact and shorten the video of Mrs. Brandon because I wanted to make certain that it was not something that would unduly inflame the jury, that it was not so prejudicial that it would inflame them unnecessarily. And I wanted to make sure that it would comply with all the jurisprudence. Therefore, the lawyers worked in that case to redact the video such that I think it is clearly admissible.

Trial Tr., vol. XXVIII, pp. 5853-54 (Feb. 14, 2006).

upon more than one person." La. Rev. Stat. § 14:30(A)(3). In addition, one of the aggravating circumstances upon which the State relied to seek the death penalty against the defendant was that the "offender knowingly created a risk of death or great bodily harm to more than one person." La. Code Crim. Proc. art. 905.4(A)(4). In these respects, the videotape depicting Mrs. Brandon's present physical and mental condition, which precluded her presence at trial, was poignantly relevant and properly admitted.

As to the victim's diplomas, the defense may be technically correct in its argument that they "go more towards the victim's worth than the victim's impact," Trial Tr., vol. XVIII, p. 5850 (Feb. 14, 2006). Nonetheless, as the State responded, the jury had already been presented with considerable evidence revealing that the victim was a minister and that he bore the title of reverend. Accordingly, we find the diplomas could not have had any untoward inflammatory impact on the jury during its penalty phase deliberations.

On appeal, defendant further contends the State introduced victim impact evidence concerning the murder of Terrance Blaze without providing notice to the defendant. Specifically, she complains about references Blaze's girl friend made describing him as "smart," "shy," and "gentle," and additional comments concerning his relationship with her three-year-old child. Trial Tr., vol. XXIX, pp. 5966-67 (Feb. 15, 2006). Defendant contends this description was misleading because other evidence demonstrated that Blaze was actually "a member of a notorious local gang." Brief for the Appellant, p. 71.

Our review of the record shows defense counsel did not lodge any objection to these brief

descriptions of Blaze's character and it has not been preserved for appellate review. La. Code Crim. Proc. art. 841; Wessinger. Nevertheless, considering it was Blaze's girl friend who made these statements, the jury surely would not have been surprised by these favorable characterizations of Blaze. See generally State v. Manning, 03-1982 (La. 10/19/04), 885 So. 2d 1044, 1099 (holding that "[a]ssuming that testimony indicating victim's family had no sympathy for defendant should not have been admitted, the error was harmless as such evidence "certainly would come as no surprise to a member of the jury"). As a result, this argument lacks merit. Moreover, these characterizations certainly did not interject an arbitrary factor into the jury's deliberations at sentencing.

Finally, the defendant complains about a portion of the State's crossexamination of Dr. Vigan concerning post-traumatic stress disorder (PTSD). On redirect, the witness had testified that defendant had first been diagnosed with PTSD at twelve years of age and still suffered from the condition. In response, the State hypothetically asked whether the defendant may have caused her nine-year old nephew to suffer from the PTSD when she brought him to the Brandon crime scene, where the victim's body still remained, following her commission of the offense.

Again, counsel lodged no objection to the State's inquiry and it has not been preserved for appellate review. La. Code Crim. Proc. art. 841. In any event, even though the hypothetical question may not have qualified as victim impact evidence under art. 905.2 and Bernard, it was arguably relevant. As the State noted, the hypothetical question addressed the defendant's character and propensities because it demonstrated defendant's

"callous behavior and reckless exposure of a young child to the horrors at the Brandon home." Brief for the Respondent, p. 47.

Defendant's claims concerning the introduction of victim impact evidence lack merit.

CONSTITUTIONALITY OF LA. CODE CRIM. PROC. art. 905.5.1

(Assignment of error 31)

The defendant claims the trial court erred when it denied her pretrial motion to declare Article 905.5.1 unconstitutional and for relief from the unconstitutional discovery requirements in article 905.5.1. The defendant's motion contended, inter alia, that the inclusion of section E in article 905.5.1 violated the defendant's constitutional rights. Specifically, the defendant contends the inclusion of section E causes her to relinquish her Fifth Amendment rights against self-incrimination because to demonstrate that she is mentally retarded, and hence exempt from execution, she must provide the State with discovery and submit to a mental examination by a state expert.

We addressed this argument in State v. Turner, 05-2425 (La. 7/10/06), 936 So. 2d 89, 103. In Turner, we reversed a district court ruling which had found article 905.5.1 unconstitutional. Specifically addressing the discovery provisions, we stated:

> When a capital defendant claims to be mentally retarded, he, too, cannot offer from the past or present that which is favorable to his contention while simultaneously withholding information which is unfavorable to his claim. In making a determination of

> whether information or records are necessary to a determination pursuant to La. Code Crim. Proc. art. 905.5.1 E, the trial court should keep in mind the relevancy of the information or records sought and La.Code Evid. art. 403. (Relevant evidence may be excluded if its probative value is outweighed by its prejudicial impact, confusion of issues or misleading to the jury).
>
> Paragraph E only mandates the disclosure of materials "relevant or necessary to an examination or determination" of the defendant's mental retardation. A fair reading of the article generally suggests it does not require a defendant to disclose any information subject to the attorney-client privilege or that may be admitted at trial on the issue of guilt. The trial court's finding that paragraph E could possibly cause a conflict with the defendant's Fifth Amendment rights is wholly speculative.

Turner, 936 So. 2d at 103.

As an initial matter, we observe that by the time the defense filed the motion objecting to the discovery provisions of the code article, it had already filed the motion to quash the indictment based on the allegation that defendant was exempt from the death penalty because she was functionally retarded, and filed its discovery responses which included much of the documentation relating to her prior mental examinations. Accordingly, we find the

defense waived any issue concerning the allegedly overly expansive discovery provisions of the statute by turning over the material unconditionally before filing the motion challenging the constitutional validity of the code article.

Moreover, we find the State was entitled to the materials under the more general discovery provision of La. Code Crim. Proc. art. 724 which provides for the production of documents and tangible objects that are in the defendant's possession and that the defendant intends to use in evidence at trial. In this case, because Dr. Vigan testified at the penalty phase that he relied upon the medical records of defendant when making his evaluation, the State then became entitled to examine the records to impeach his testimony. See State v. Williams, 445 So. 2d 1171, 1181 (La. 1984) (citing State v. Monroe, 17 So. 2d 331 (La. 1944)) (the State "does not and cannot know what evidence the defense will use until it is presented at trial," it is for this reason that the prosecution has been given the right of rebuttal).

Lastly, the defendant fails to show her submission of any allegedly nondiscoverable records under the code articles prejudiced her. Cf. Bourque, 622 So. 2d at 239 (before being entitled to relief, defendant must show prejudice resulting from the state's failure to comply with discovery procedure). Accordingly, defendant's assignment of error lacks merit.

DEFENDANT'S PRO SE MOTIONS

(Assignments of error 6 -9)

In these assignments, the defendant claims the trial court erred when it did not entertain her

pro se motion for a change of venue and when it denied her motion for appointment of new counsel.

The defendant's pro se handwritten motion for change of venue reads in pertinent part:

> I'm not trying to tactic a delay, But only a fair trial. I feel a fair & impartial trial "will not" be obtained in this parish, due to the local parish where the prosecution is pending, and that they will affect answers of the jurors on the voir dire examination or the testimony of any witnesses at trial. By me crime being such a high profile case, by reason of prejudice existing in the public minds, where the nature of my case was notorious for months. And the community is outraged by it, influenced blisted [sic] in both TV & newspapers where such as here at the jail CCC been "placed on display" for the tours of the jail, where deputy's [sic] tell tours who I am, what I'm here for, what they think might happen to me & etc like on 09-02-03. Bye all these things that it will make an impossible fair trial. I feel as these factors will cumulative and affect and deprive me of a fair and impartial trial. And that my rights are totally being ignorant in this case.

Trial Tr., vol. III, p. 667 (Oct. 9, 2003).

In the motion for appointment of new counsel, defendant's pleading provides:

> I want some new other than David R. McClatchey because his not willing to help me, he does not want me to take my case to trial. And he tricked me into believing something different and is forcusing [sic] to accept a plead [sic], that I refuse to accept anything but my trial only. He told me his trying to save my life I'll be better off with life anyways.

Trial Tr., vol. III, p. 669 (Oct. 9, 2003).

The trial court did not specifically address the motion for a change of venue, but ruled as follows on the defendant's motion for substitution of counsel:

> All right. Mr. McClatchey, I realize that this pro se [m]otion has put you in a difficult position, because her pro se [m]otion is she wants new [c]ounsel.
>
> All right. My position is that, if somebody has [c]ounsel, I am not going to consider their pro se [m]otions. You cannot have it both ways.
>
> You have got a [l]awyer. Mr McClatchey has been appointed by the Court to represent you. He is probably one of the most experienced capital [a]ttorneys in the whole part of the [s]tate, and this [m]otion to appoint new

> [c]ounsel is absolutely ludicrous. I am denying it.
>
> I am just telling you right now, Ms. Holmes, that I am not going to consider any pro se [m]otions. You have an [a]ttorney. Your [a]ttorney is going to be filing [m]otions for you in court.

Trial Tr. Supp. Vol., pp. 2-3.

It is well established that motions pending at the commencement of trial are waived when the defendant proceeds to trial without raising as an issue the fact that the motions were not ruled upon. State v. Williams, 97-1135 (La. App. 5 Cir. 5/27/98), 714 So. 2d 258, 264; State v. Scamardo, 97-0197 (La. App. 5 Cir. 02/11/98), 708 So. 2d 1126, 1129, writ denied, 98-0672 (La. 7/2/98), 724 So. 2d 204; State v. Price, 96-0680 (La. App. 5 Cir. 2/25/97), 690 So. 2d 191, 196. Thus, by not adopting the defendant's motion for a change of venue, defense counsel waived it. Furthermore, given the totality of the prospective jurors' responses during voir dire, the defendant has not shown that a motion for a change of venue would have had any merit and thus no prejudice occurred when the trial court failed to rule on the motion. See La. Code Crim. Proc. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.").

Moreover, a trial court need not even entertain pro se motions when a defendant is represented by counsel and entertaining the motions will lead to confusion at trial. See, e.g., State v. Outley, 629 So. 2d 1243, 1250 (La. App. 2 Cir. 1993), writ denied, 94-0410 (La. 5/20/94), 637 So. 2d 476

("It is well-settled in Louisiana that a trial court is not required to entertain motions filed by a defendant who is represented by counsel.")(citing State v. McCabe, 420 So. 2d 955, 958 (La. 1982)("While an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative.")). Accordingly, the defendant's assignments of error are meritless.

CAPITAL SENTENCE REVIEW

Under La. Code Crim. Proc. art. 905.9 and La. S. Ct. Rule 28, we review every sentence of death imposed by Louisiana courts to determine if it is constitutionally excessive. In making this determination, the Court considers whether the jury imposed the sentence under the influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate considering both the offense and the offender.

The district judge has filed the Uniform Capital Sentence Report ("UCSR") required by La. S. Ct. Rule 28 § 3(a) and the Department of Public Safety and Corrections submitted a Capital Sentence Investigation Report ("CSIR"). See La. S. Ct. Rule 28 § 3(b). In addition, the State and the defense have filed sentence review memoranda.

Those documents and Brenda Bruce's penalty phase testimony show defendant, Brandy Aileen Holmes, is a Caucasian female, born on July 25, 1979, to the legal union of Johnny Holmes and Brenda Bruce in Tylertown, Mississippi. Defendant's parents separated and defendant moved with her mother to Shreveport when she was two years of age.

Defendant's father testified at the guilt phase concerning the theft of the murder weapon from his residence in Mississippi. Brenda Bruce testified at the penalty phase about defendant's difficult birth and her consumption of alcohol during her pregnancy. Defendant has an older sister and a younger brother, both of whom appear to be half-siblings.[31] Although the defendant claims to have one child, no evidence presented supports that allegation.

According to the defendant's mother, the defendant began school in special education, and she only completed the sixth grade. Mrs. Bruce further claimed that defendant was raped at 12 years of age and was committed to a mental hospital for six months. Defendant has an extremely lengthy juvenile and adult criminal history.[32] In fact, since

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[31] In her penalty phase testimony, Brenda Bruce stated she has four living children, all from different fathers. However, the UCSR only refers to two siblings of defendant.

[32] The UCSR reveals that defendant has juvenile delinquency adjudications for the following offenses: carrying a concealed weapon; attempted simple escape; damage to property; possession of stolen property; theft; and unauthorized entry of an inhabited dwelling. As a juvenile, defendant was also arrested for damage to property and possession and concealing stolen property although these charges were dismissed.

As an adult, defendant has felony convictions for attempted aggravated escape and aggravated battery. In addition, she has the following misdemeanor convictions: seven counts of simple criminal damage to property; four counts of simple battery; and two counts of battery of a police officer.

The district attorney dismissed the attempted first-degree murder charge relating to the shooting of Mrs. Brandon. The second-degree murder count relating to the homicide of Terrance Blaze is apparently still pending in Caddo Parish.

the age of 14 or 15, it appears the defendant was continuously incarcerated except for a period of approximately seven months preceding the present offense. Defendant has no history of gainful employment.

PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS

The first-degree murder of Julian Brandon, Jr., occurred on January 1, 2003, and following jury selection, trial commenced in February of 2006, over three years after the crime was committed. The victim, a Caucasian male, was 70 years of age at the time of his death. Alice Brandon, who survived being shot in the head by defendant or Coleman, is also Caucasian, and was 68 years of age at the time of the offense. Defendant, a Caucasian female, was 23 years old at the time of this offense. Race was not an issue at trial.

No pretrial publicity tainted the jury pool. Although defendant filed a pro se motion for a change of venue shortly after her indictment, it was not pursued by counsel.

Defendant raised various instances in which she claimed arbitrary factors were interjected into her capital trial. However, all of these allegations were addressed in the text of this opinion and found without merit.

AGGRAVATING CIRCUMSTANCES

The State relied on three aggravating circumstances under La. Code Crim. Proc. art. 905.4(A) and the jury returned the verdict of death, finding all three were supported by the evidence: (1) the offender was engaged in the perpetration or

attempted perpetration of an armed robbery; (2) the victim was older than 65 years of age; and (3) the offender knowingly created a risk of death or great bodily harm to more than one person La. Code Crim. Proc. art. 905.4(A)(1), (4), and (10). The State's evidence presented in the guilt phase, and reintroduced at the penalty phase, established that, either personally or acting as a principal, defendant shot both Julian and Alice Brandon, and stabbed Julian Brandon. The shootings and stabbing occurred during the defendant's armed home entry into the Brandons' residence in which she took jewelry and credit cards from the house, where the lawful occupants of the residence had lived beyond their 65th birthdays. The three aggravating circumstances relied upon by the State were fully supported by the evidence. Consequently, the defendant's sentence of death is firmly grounded.

PROPORTIONALITY

Although the federal Constitution does not require proportionality review, Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. State v. Burrell, 561 So. 2d 692, 710 (La. 1990), cert. denied, 498 U.S. 1074, 111 S. Ct. 799, 112 L.Ed. 2d 861 (1991); State v. Wille, 559 So. 2d 1321, 1341 (La. 1990); State v. Thompson, 516 So. 2d 349, 357 (La. 1987), cert. denied, 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed. 2d 149 (1988). This Court, however, has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding in that one case, inter alia, a sufficiently "large number of persuasive mitigating factors." State v. Sonnier, 380

So.2d 1, 9 (La. 1979); see also State v. Weiland, 505 So.2d 702, 707-10 (La. 1987) (in case reversed on other grounds, dictum suggesting that death penalty disproportionate).

We review death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. Sonnier, 380 So.2d at 7.

The State's Sentence Review Memorandum reveals that since 1976, jurors in the First Judicial District Court have returned a guilty verdict in 41 capital cases, including defendant's case, and of those, juries have recommended the imposition of the death penalty 15 times.[33]

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[33] State v. Holmes (the present case); State v. Coleman, 06-0518 (La. 11/02/07), 970 So. 2d 511 (co-defendant in the present case; conviction and sentence reversed on appeal based on racial discrimination in the State's exercise of peremptory challenges); State v. Campbell, 06-0286, 2008 WL 2150946; State v. Draughn, 05-1825 (La. 1/17/07), 950 So. 2d 583; State v. Wilson, 03-1229 (La. 3/30/05), 899 So. 2d 551 (death sentence vacated in light of Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), because Wilson was a minor at the time of the offenses; resentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence); State v. Williams, 01-1650 (La. 11/01/02), 831 So. 2d 835 (following a hearing pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), Williams was deemed retarded and resentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence); State v. Irish, 00-2086 (La. 1/15/02), 807 So. 2d 208, cert. denied, 537 U.S. 846, 123 S. Ct. 185, 154 L.Ed. 2d 73 (2002); State v. Deal, 00-0434 (La. 11/28/01), 802 So.2d 1254; State v. Edwards, 97-1797 (La. 7/2/99), 750 So. 2d 893, cert. denied, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed. 2d 421 (1999);

It is appropriate for this Court to look beyond the 1st JDC and conduct the proportionality review on a statewide basis. Cf. State v. Davis, 92-1623 (La. 5/23/94), 637 So. 2d 1012, 1030-31, cert. denied, 513 U.S. 925, 115 S.Ct. 450, 130 L.Ed. 2d 359 (1994). This Court has observed that Louisiana juries appear especially prone to impose capital punishment for crimes committed in the home. See State v. Leger, 05-0011 (La. 7/10/06), 936 So.2d 108, cert. denied, ___ U.S. ___, 127 S.Ct. 1279, 167 L.Ed. 2d 100 (2007); State v. Blank, 04-0204 (La. 4/11/07), 955 So. 2d 90, cert. denied, ___ U.S. ___, 128 S.Ct. 494, 169 L.Ed. 2d 346 (2007); State v. Bridgewater, 00-1529 (La. 1/15/02), 823 So. 2d 877, cert. denied, 537 U.S.1227, 123 S.Ct. 1266, 154 L.Ed. 2d 1089 (2003)[34]; State v. Jacobs, 99-1659 (La. 6/29/01), 789

State v. Hampton, 98-0331 (La. 4/23/99), 750 So. 2d 867, cert. denied, 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed. 2d 390 (1999); State v. Cooks, 97-0999 (La. 9/9/98), 720 So. 2d 637, cert. denied, 526 U.S. 1042, 119 S.Ct. 1342, 147 L.Ed. 2d 505 (1999); State v. Tyler, 97-0338 (La. 9/9/98), 723 So. 2d 939, cert. denied, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed. 2d 556 (1999); State v. Davis, 92-1623 (La. 5/23/94), 637 So. 2d 1012, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed. 2d 359 (1994); State v. Code, 627 So. 2d 1373 (La. 1993), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed. 2d 490 (1994); State v. Felde, 422 So. 2d 370 (La. 1982), cert. denied, 461 U.S. 918, 103 S.Ct. 1903, 77 L.Ed. 2d 280 (1983).

Of the above-listed cases, Holmes, Coleman, Draughn, Edwards, Cooks, and Code all involved victims that were murdered in their own homes.

[34] Conviction for first-degree murder and death sentence set aside; jury's verdict of guilty modified by this Court and judgment of guilty of second-degree murder entered; remanded to trial court for sentencing to life imprisonment under La. Rev. Stat. § 14:30.1(B). State v. Bridgewater, 00-1529 (La. 1/15/02), 823 So.2d 877.

So. 2d 1280;[35] State v. Howard, 98-0064 (La. 4/23/99), 751 So. 2d 783, cert. denied, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed. 2d 328 (1999); State v. Gradley, 97-0641 (La. 5/19/98), 745 So. 2d 1160; State v. Robertson, 97-0177 (La. 3/4/98), 712 So. 2d 8, cert. denied, 525 U.S. 882, 119 S. Ct. 190, 142 L.Ed. 2d 155 (1998); State v. Tart, 92-0772 (La. 2/9/96), 672 So. 2d 116 (La. 1996), cert. denied, 519 U.S. 934, 117 S.Ct.310, 136 L.Ed. 2d 227 (1996); State v. Code, 627 So. 2d 1372 (La. 1993); State v. Burrell, 561 So. 2d 692 (La. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 779, 112 L.Ed. 2d 861 (1991); State v. Perry, 502 So. 2d 543 (La. 1986), cert. denied, 484 U.S. 992, 108 S.Ct. 511, 98 L.Ed. 2d 511 (1987); State v. Wingo, 457 So. 2d 1159 (La. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2049, 85 L.Ed. 2d 322 (1985); State v. Glass, 455 So. 2d 659 (La. 1984), cert. denied, 471 U.S. 1080, 105 S.Ct. 2159, 85 L.Ed. 2d 514 (1985); State v. Summit, 454 So. 2d 1100 (La. 1984), cert. denied, 470 U.S. 1038, 105 S. Ct. 1411, 84 L.Ed. 2d 800 (1985); State v. Williams, 490 So. 2d 255 (La. 1986), cert. denied, 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed. 2d 780(1987). Wingo observed in this regard that "[t]he murder of a person by an intruder violating the sanctuary of the victim's own home [is] a particularly terrifying sort of crime to decent, law abiding people." Id., 457 So. 2d at 1170.

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[35] Jacobs's conviction and death sentence were reversed on appeal. State v. Jacobs, 99-1659 (La. 6/29/01), 789 So. 2d 1280. During the pendency of his retrial, the United States Supreme Court rendered its decision in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005)(Eighth Amendment precludes capital punishment for offenders under the age of 18 when they committed their crimes), making Jacobs, who was 16 years of age at the time of the offense, ineligible to face capital sentencing on retrial.

Moreover, Louisiana juries have not hesitated in imposing the death penalty in a variety of cases involving multiple deaths or when a defendant creates the risk of death or great harm to more than one person. See State v. Scott, 04-1312 (La. 1/19/06), 921 So. 2d 904, cert. denied, ___ U.S. ___, 127 S.Ct. 137, 166 L.Ed. 2d 100 (2006) (two female bank tellers shot during bank robbery; first-degree murder convictions affirmed, case remanded for hearing under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)); State v. Brown, 03-0897 (La. 4/12/05), 907 So. 2d 1 (couple kidnaped from their home, both shot and then found burned in their torched vehicle); State v. Wessinger, 98-1234 (La. 5/28/99), 736 So. 2d 162, cert. denied, 528 U.S. 1050, 120 S.Ct. 589, 145 L.Ed. 2d 489 (1999) (ex-employee returned to restaurant, shot three employees and killed two); State v. Robertson, 97-0177 (La. 3/4/98), 712 So.2d 8, cert. denied, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed. 2d 155 (1998) (mixed-race couple stabbed to death in their home during an aggravated burglary); State v. Baldwin, 96-1660 (La. 12/12/97), 705 So. 2d 1076, cert. denied, 525 U.S. 831, 119 S.Ct. 84, 142 L.Ed. 2d 66 (1998) (defendant shot and killed his estranged wife and the three men who were with her at the time); State v. Tart, 93-0772 (La. 2/9/96), 672 So. 2d 116, cert. denied, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed. 2d 227 (1996) (defendant murdered his estranged girl friend and severely wounded her mother); State v. Taylor, 93-2201 (La. 2/28/96), 669 So. 2d 364, cert. denied, 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed. 2d 106 (1996) (ex-employee returned to restaurant, killed one employee and attempted to kill another); State v. Sanders, 93-0001 (La. 11/30/94), 648 So. 2d 1272, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed. 2d 194 (1996) (husband killed estranged wife

and new boyfriend); State v. Deboue, 552 So. 2d 355 (La. 1989), cert. denied, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed. 2d 174 (1990) (murder of two children in an apartment defendants intended to burglarize).

Finally, with respect to La. Code Crim. Proc. art. 905.4(A)(10) and La. Rev. Stat. § 14:30(A)(5) (victim over the age of 65), juries in Louisiana have readily returned the death sentence when the elderly are preyed upon as victims. See Draughn, supra; Bridgewater, supra; Jacobs, supra; State v. Bowie, 00-3344 (La. 4/3/02), 813 So. 2d 377, cert. denied, 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed. 2d 297 (2002); Howard, supra; Gradley; supra; State v. Taylor, 99-1311 (La. 1/17/01), 781 So. 2d 1205, cert. denied, 534 U.S. 844, 122 S.Ct. 106, 151 L.Ed. 2d 64 (2001).

Compared to these cases, it cannot be said the death sentence in this case is disproportionate.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. This judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial court shall, upon receiving notice from this Court under La. Code Crim. Proc. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by La. Rev. Stat. § 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with

reasonable time in which: (1) to enroll counsel to represent the defendant in any State post-conviction proceedings, if appropriate, pursuant to its authority under La. Rev. Stat. § 15:149.1; and (2) to litigate expeditiously the claims raised in that application, if filed in the state courts.

AFFIRMED.

UNPUBLISHED APPENDIX

KNOLL, JUSTICE.

The incomplete record violates defendant's due process
(Assignment of error 34)

In this assignment, defendant claims she has been denied the right to appellate review and effective assistance of appellate counsel because "over forty-seven bench conferences were not recorded during Ms. Holmes' trial." Brief for the Appellant, p. 20. She argues that while some bench conferences merely concerned scheduling, 13 of these conferences addressed issues during voir dire and several occurred immediately before or after the testimony of key witnesses. Accordingly, defendant contends "[tlhe deficiencies of the record frequently make it impossible to determine if, when and on what basis objections were made and how the court ruled." Id., p. 2 1.

La. Const. art. I, § 19 guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." Although this Court has found reversible error when material portions of the trial record were unavailable or incomplete, a "slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal" does not require reversal of a conviction. State v. Brumfiield, 96-2667 (La. 10/28/98), 737 So.2d 660, 669; State v. Parker, 361 So.2d 226,227 (La. 1978); State v. Ford, 338 So.2d 107, 110 (La. 1976).

Defendant contends her case is similar to State v. Landry, 97-0499 (La. 6/29/99), 75 1 So. 2d 2

14 and maintains that the deficiencies in the record require that her conviction and sentence be vacated.[1] Despite defendant's claims to the contrary, our review of the selected inadequacies in the record does not show a demonstrable basis for defendant's assertions.

With regard to the unrecorded bench conferences, without an objection, La. Code Crim. Proc. art. 841, and a showing of prejudice, defendant cannot prevail. State v. Castleberry, 98-1338 (La. 4/13/99), 758 So. 2d 749, 773. In this case, defendant fails to show that the unrecorded conferences "prevented [her] from presenting [] relevant evidence," or that "prejudice resulted from the absence in the record of the substance of the conferences." State v. Brumfield, 737 So.2d at 669-70. The record reveals that defendant did, in fact, lodge numerous objections to various trial court rulings and each of those objections was preserved for appellate review and was treated on its merits in our published opinion. Defendant's claim concerning unobjected to deficiencies in the record lacks merit.

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[1] Landry was fraught with myriad record inadequacies, including a voir dire transcript which failed to identify jurors as they responded to questions and then buried their answers with a multitude of "inaudibles" caused by construction noise. Additionally, 40 cause challenges which the trial court granted were rendered completely unreviewable because of the deficient record. The combination of construction noise and the absence of adequate safeguards for recording the trial proceedings dictated reversal. Landry, 75 1 So. 2d at 214-1 6. No such circumstances exist in the present case.

OTHER CRIMES EVIDENCE
(Assignment of error 25)

In this argument, the defendant contends the State introduced impermissible other crimes and bad character evidence at the guilt phase of the trial. Specifically, the defendant focuses on an offhand remark Erica Vinson, an acquaintance of the defendant, made during the State's direct examination. Specifically, Vinson stated that in addition to the defendant's admission of her involvement in the present offense, the defendant also claimed that she had "killed another person [Terrance Blaze] that had raped her a long time ago." Trial Tr., vol. XXV, P. 5409. (Feb. 11, 2006). The defendant also complains because the State failed to redact portions of her statements to police in which she made several references suggesting her involvement in gang activity. In particular, the State played the recorded portion of defendant's statement in which she stated that she intended to "hit a major lick," and explained that it was "sheet speak" "not only for robbery" but "can be equally employed for a murder robbery." Trial Tr., vol. XXVIII, p. 5771 (Feb. 14, 2006). Finally, defendant notes the State referenced her gang-related slang lingo in his closing argument.

As an initial matter, the defendant failed to object to any of this evidence and thus waived any claim based on it. La. Code Crim. Proc. art. 841. Notwithstanding, because Vinson's reference to the defendant's admission about the other murder was entirely unsolicited, it would not have warranted a

mistrial under La. Code Crim. Proc. art. 770;[2] but rather only an admonition under art. 771.[3] Regarding the vague references to the defendant's alleged gang affiliations, although large portions of her inculpatory statements were redacted, the defense did not object to defendant's use of street lingo.

In any event, given the brevity of the other crimes references, they pale when compared to the overwhelming (and properly admitted) evidence of the defendant's guilt of the present charged crime. Assuming defense counsel had lodged objections to the other crimes evidence and that the objections had been erroneously overruled, no relief would be warranted because the admission of the evidence surely had no effect on the jury's verdict. See State v. Johnson, 94-1379 (La. 1/27/95), 664 So.2d 94, 101 (erroneous admission of other crimes evidence is subject to harmless-error analysis under Chapman

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[2] La. Code Crim. Proc. art. 770 provides:

> [A] mistrial shall be ordered when a remark or comment made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in an argument, refers directly or indirectly to: . . . (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible.

[3] La. Code Crim. Proc. art. 771 provides that a mistrial may be ordered when the remark or comment is made by a witness or person other than the judge, district attorney, or a court official. Under art. 771, a mistrial is discretionary and should be granted only when the prejudicial remarks of the witness make it , impossible for the defendant to obtain a fair trial. State v. Smith, 418 So.2d 515, 522 (La. 1982); State v. Prudholm, 446 So.2d 729, 741 (La. 1984).

v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) standard).[4] This assignment lacks merit

PENALTY PHASE: OTHER CRIMES

Defendant also complains about unredacted references made during the penalty phase to narcotics and gang activity in her statement in which she alleged that Marcus killed Blaze. Once again, defendant did not object to the evidence and thus waived any claim based on it subject to Rule 28 review. La. Code Crim. Proc. art. 841; State v. Wessinger, 98-1234 (La. 5/14/99), 736 So.2d 162 (reviving contemporaneous objection rule for penalty phase of a capital trial subject to Rule 28 review for arbitrary factors undermining confidence in the reliability of jury's sentencing verdict). Nevertheless, because the falsity of her allegations in this statement was later amply demonstrated, other than demonstrating the defendant's untruthfulness, they did not prejudice her.

Next, the defendant maintains the overwhelming evidence of Blaze's murder and the attempted invasion of the Camp residence improperly shifted the jury's focus away from the present crime. Defendant notes that "over two thirds of the state's penalty phase case (11 out of 14

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[4] Under Chapman, an appellate court must decide "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction," and "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." Id., 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710-11. The reviewing court must therefore be able to say that the jury's verdict in the particular case was surely unattributable to the error. Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078 (1993); State v. Sanders, 93-0001 (La. 11/30/94), 648 So. 2d 1272, 1291.

witnesses) consisted of evidence of the Terrance Blaze murder." Brief for the Appellant, p. 48. Again, the defendant lodged no objection to this evidence and thus waived any claim based on it, subject to Rule 28 review. La. Code Crim. Proc. art. 841; Wessinger. Notwithstanding, evidence of the unadjudicated murder undoubtedly cast light on defendant' s character and propensities. La. Code Crim. Proc. art. 905.2. In this situation, the defendant fails to show the State's evidence impermissibly shifted the jury's focus from the offense for which she was tried. State v. Letulier, 97-1370 (La. 7/8/98), 750 So.2d 784, 794 (holding that the testimony of seven witnesses and victim of unadjudicated attempted murder did not inject an arbitrary factor into penalty phase of capital murder prosecution and was admissible).

Lastly, the defendant claims the State improperly emphasized the other crimes evidence during closing argument at the penalty phase.[5]

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[5] For instance, defendant alleges the following portion of the State's argument improperly focused on the unadjudicated offenses:

> We gave you basically two trials. No, really three. You had the trial for the murder of Reverend Brandon and shooting Alice. You had the trial for the murder of Terrance Blaze, and you heard overwhelming evidence that Brandy was responsible for that killing. And then you had the testimony of Mrs. Camp and all the circumstances surround that of Brandy's admission.
>
> Now, someone who murders one, murders two, shoots a third, plans to kill a fourth and fifth doesn't deserve the most serious penalty the law allows and the only thing they can offer in

Again, defense counsel lodged no objections to the State's closing argument and thus waived any claim based on it. La. Code Crim. Proc. art. 841; Wessinger, supra. Notwithstanding, at the conclusion of closing arguments, the trial court instructed the jury that it should only consider evidence of her participation in Blazes's murder "for the purpose of assessing the character and propensities of the defendant, Brandy Holmes." Trial Tr., vol. XXX, p. 6242 (Feb. 16, 2006). Under these circumstances, the defendant fails to show any likelihood that the State's argument improperly shifted the jury's focus to the other crimes evidence presented at the penalty phase and away from defendant's character and propensities. This assignment of error is meritless.

GUILT AND PENALTY PHASES: STATE'S ARGUMENT
(Assignments of error 35, 38)

In these assignments, the defendant claims that graphic crime scene and autopsy photographs and video improperly influenced the jury at both phases at the trial. The record shows except for the "day-in-the-life" video discussed supra in the body of the published opinion, defendant lodged no objection to the evidence at trial and thus waived any claim based on its admission. La. Code Crim. Proc. art. 841; Wessinner, supra. Nevertheless, photographic evidence will be admitted unless it is so gruesome as to overwhelm the jurors' reason and lead them to

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mitigation is mamma drank, then there is no one for whom the death penalty is appropriate.

Trial Tr., vol. XXX, p. 62 19 (Feb. 16,2006).

convict the defendant without sufficient other evidence. State v. Perry, 502 So.2d 543, 558-59 (La. 1986), cert. denied, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987). Even when the cause of death is not at issue, the State is nonetheless entitled to the moral force of its evidence and post-mortem photographs of murder victims are admissible to prove corpus delicti, to corroborate other evidence establishing the cause of death, location, placement of wounds, as well as to provide positive identification of the victim. State v. Maxie, 93-2158 (La. 4/10/95), 653 So.2d 526, 532, n.8, citing State v. Martin, 93-0285 (La. 10/17/94); 654 So.2d at 198; State v. Watson, 449 So.2d 1321, 1326 (La. 1984); State v. Kirkpatrick, 443 So.2d 546, 554-55 (La. 1983); State v. Brogdon, 426 So. 2d 158, 169 (La. 1983). Because the defendant has failed to point to any specific photograph that unduly prejudiced jurors against her, we find the conclusory allegation about the evidence does not support the defendant's contention.

Defendant also complains about several allegedly inappropriate comments the State made during closing argument during the penalty phase. As an initial matter, we note the record shows the only portion of the closing argument defense counsel objected to was the State's reference to what he had "read on the internet" about FAS. Trial Tr., vol. XXX, p. 6213 (Feb. 16, 2006). Although the trial court overruled the objection, the State did not pursue the argument further and we do not discern this limited reference somehow influenced the jury's verdict at the sentencing phase. As a result, no relief is warranted.

Defendant also complains about unobjected-to portions of the State's closing argument when the State argued that the mitigating circumstances

urged by the defense should not convince the jury to return a life sentence. Specifically, the defendant focuses on statements during the State's rebuttal in which it questioned the veracity and/or significance of defense claims concerning her diminished mental capacity, her prior mental health problems, and her history of sexual abuse. However, while it is well-settled that the State may not argue that a particular factor should not be a mitigating circumstance, it is perfectly acceptable for the State to try to disprove the existence of a mitigating factor. See Ward v. Whitley, 21 F.3d 1355, 1364 (5th Cir. 1994)("There is a fine line between the argument that a statutory mitigating circumstance merits no weight in the jury's ultimate decision and the argument that the mitigating circumstance should not be considered or is not mitigation. The former is permissible under Louisiana law; the latter is not.")(footnotes omitted). In the present case, the State's comments were intended to question the validity of the evidence of the mitigating factors the defendant raised in her closing argument rather than suggesting that the mitigating circumstances themselves did not warrant the jury's consideration. Accordingly, this assignment of error lacks merit.

CUMULATIVE ERROR.

Next, the defendant claims entitlement to a reversal of her conviction and/or sentence because of the cumulative effect of prejudicial errors. However, as discussed above in our published opinion, the vast majority of the defendant's claims lack merit whatsoever; moreover, the few that are supported by the facts and law could not have contributed to the verdict at either phase of trial. As a result, this assignment is without merit. Cf. State v. Strickland,

93-0001 (La. 11/1/96), 683 So.2d 218, 239 (harmless errors, however numerous, do not aggregate to reach the level of reversible error); State v. Tart, 94-0025 (La. 2/9/96), 672 So.2d 116, 164, cert. denied, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996); State v. Copeland, 530 So.2d 526, 544-45 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989)(citing State v. Graham, 422 So. 2d 123, 137 (La. 1982)); State v. Sheppard, 350 So. 2d 615,651 (La. 1977)); see also, State v. Smith, 95-1826 (La. App. 1 Cir. 9/27/96), 681 So.2d 980, 994, writ denied, 96-2658 (La. 3/27/97), 692 So.2d 390; Cf. Mullen v. Blackburn, 808 F.2d 1143, 1147 (5th Cir. 1987) (court rejects cumulative error claim and finds that "twenty times zero equals zero"); Foster v. State, 639 So.2d 1263, 1303 (Miss. 1994) (finding no "near errors" and so rejecting cumulative error analysis).

Assignments of Error not Argued:

Defendant failed to argue these assigned errors and they are thus properly considered abandoned. See La. S.Ct Rule VII, § 6 (assignments of error made but not briefed considered abandoned). Nevertheless, because of the imposition of the death penalty in the present case, they will be briefly addressed to the extent possible.[6]

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[6] We note the defendant has provided written argument on some of these assigned errors in her reply brief. Arguments raised for the first time in the reply brief are not considered. Cf. Rule 2-12.6, Uniform Rules Courts of Appeal ("The appellant may file a reply brief, if he has timely filed an original brief, but it shall be strictly confined to rebuttal of points urged in the appellee's brief.") (Emphasis added).

The trial court erred when it allowed defense counsel to concede her guilt to second-degree murder. (Assignment of error 10).

While a "complete concession of the defendant's guilt nullifies his right to have the issue of his guilt or innocence presented to the jury . . . and therefore constitutes ineffective assistance," Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983) (emphasis supplied), cert. denied, 470 U.S. 1059, 105 S.Ct. 1776, 84 L.Ed.2d 835), a partial concession may simply reflect sound trial strategy. State v. Hamilton, 92-1919 (La. 9/5/96), 681 So.2d 12, 17 (unpublished appendix). Considering the defendant's numerous confessions to her commission of the present offense and her possession of the victim's property, defense counsel's decision to concede her guilt to second-degree murder fell well within the ambit of sound trial strategy. See State v. Myles, 389 So.2d 12, 39 (La. 1980) (This Court "does not sit to second-guess strategic and tactical choices made by trial counsel."). Accordingly, we find no merit to the defendant's argument.

The trial court's exclusion of jurors opposed to the death penalty violated defendant's right to be tried by a jury of her peers. (Assignment of error 19).

Bare assertions "that a death qualified jury is more likely to convict than others" do not suffice to state a claim. State v. James, 431 So.2d 399, 402 (La. 1983), cert. denied, 464 U.S. 908, 104 S.Ct. 263, 104 L.Ed.2d 263 (1983); cf. Lockhart v. McCree, 476 U.S. 162, 174-176, 106 S.Ct. 1758, 1765-67, 90 L.Ed.2d 137 (1 986) (death-qualified jury does not violate fair-cross-section requirement, which in any case does not extend to petit juries); State v. Tassin,

536 So.2d 402, 407 (La. 1988), cert. denied, 493 U.S. 874, 110 S.Ct. 205, 107 L.Ed.2d 159 (1989) (same). Here, at the time of trial, the State was legislatively authorized to seek a death sentence and this capital trial was held in accordance with the law of this state. Thus, this assignment of error is without merit.

The State improperly relied on the discovery provisions of La. Code Crim. Proc. art. 905.5.1 to present evidence outside the scope of the code article at the penalty phase. (Assignment of error 32).

The thrust of this unargued assigned error has been discussed supra in the portions of the published opinion addressing the evidence presented at the penalty phase and the discovery the defense provided to the State. Considering the absence of argument concerning prejudice resulting from the State's receipt of discovery, we find no merit to this assignment of error.

The trial court read an incorrect instruction on principals at the penalty phase. (Assignment of error 33).

The trial court read an instruction on principals as it related to the degree murder of Terrance Blaze. As such, the trial court charged the jury that it could consider "for the purpose of assessing the character and propensities of the defendant, Brandy Holmes." Trial Tr., vol. XXX, p. 6242 (Feb. 16, 2006). The trial court's instruction on principals, specifically that "[a]ll persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its

commission, or direct or indirectly counsel or procure another to commit a crime are principals" essentially tracks the language of La. Rev. Stat. 5 14:24. The defendant did not object to this jury charge. No error is discerned.

The trial court erred when it denied the defense motions for continuances. (Assignment of error 36).

This Court has consistently held that the decision whether to grant or refuse a motion for a continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb such a determination absent a clear abuse of discretion. La. Code Crim. Proc. art. 712; State v. Bourque, 622 So.2d 198, 225 (La. 1993). In addition, this Court generally declines to reverse convictions even on a showing of an improper denial of a motion for continuance absent a showing of specific prejudice. Id.; State v. Champion, 412 So.2d 1048, 1051 (La. 1982). No specific prejudice has been established in the present case. Accordingly, this assignment of error is meritless.

The State's late production of discovery violated defendant's right to due process and effective assistance of counsel (Assignment of error 3 7).

Given the unargued nature of this assignment and defendant's failure to point to any contemporaneous objection to the State's discovery responses on timeliness grounds, the defendant fails to show any basis for relief.

The trial court's commutation instruction injected arbitrary factors into the jury's deliberations (Assignment of error 39).

In State v. Loyd, 96-1805 (La. 2/3/97), 689 So.2d 1321, we held that "Louisiana's instruction is an even-handed one which accurately informs jurors that a death sentence as well as a life sentence remains subject to executive revision." Loyd, 689 So.2d at 1331. This Court also rejected the same argument in State v. Wessinger, 98-1234 (La. 5/28/99), 736 So.2d 162, 190. Based upon well established jurisprudence, we find this assignment of error lacks merit.

Questions concerning defendant's competence vitiate the validity of her appeal. (Assignment of error 40).

Following the defendant's conviction, appellate counsel filed a "motion for hearing to determine competency on appeal." On July 9, 2007, we denied the defendant's motion. State v. Holmes, 06-2998 (La. 7/9/07). Defendant's claim that the trial court erred when it found she possessed the capacity to proceed was addressed in detail earlier in this opinion. Given the defendant's failure to show that the trial court erred when it found her competent based on the unanimous recommendation of the sanity commission, she likewise cannot show the trial court's ruling had any deleterious effect on her constitutional right to appeal. The general rule holds that an appeal may proceed even when the defendant is incompetent. See State v. Dugar, 615 So.2d 1334, 1335 (La. 1993)("Counsel may proceed with an appeal on petitioner's behalf despite the district court's finding of incompetence."). Accordingly, we find no merit to this assignment of error.

The Louisiana death penalty statute is unconstitutional because it fails to require the jury

to determine that death is the appropriate penalty beyond a reasonable doubt. (Assignment of error 41).

A review of the jury instruction reveals that it correctly stated the law when it charged the jury that it "unanimously must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists." Trial Tr., vol. XXX, P. 6243 (Feb. 16,2006); see La. Code Crim. Proc. art. 905.3 ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists . . . ."). Based upon well established statutory law, we find this assignment lacks merit. See, e.g;., State v. Code, 627 So.2d 1373 (La. 1993), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994) (instructions similar to those in Bench Book; Court affirms capital sentence over argued assignment of error, after objection at trial, on penalty phase instruction). Additionally, we further note Louisiana law does not require jurors to find ultimately that beyond a reasonable doubt death is the appropriate sentence. State v. Koon, 96-1288 (La. 5/20/97), 704 So.2d 756, 772-73, cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1998).

The short form indictment violates due process. (Assignment of error 42).

Defendant waived any claim concerning any alleged technical deficiencies in the indictment by failing to contest its sufficiency before trial. The time for testing the sufficiency of an indictment or bill of information is before trial by way of a motion to quash or an application for a bill of particulars. State v. Gainey, 376 So.2d 1240, 1243 (La. 1979). We reject post-verdict attacks on the sufficiency of an indictment unless the indictment failed to give fair

notice of the offense charged or failed to set forth any identifiable offense. State v. Williams, 480 So.2d 721,722, n.1 (La. 1985); La. Code Crim. Proc. art. 465 Official Revision Comment (a).

Notwithstanding the procedural bar to this claim, the 1974 Louisiana Constitution provides that an accused shall be informed of the nature and cause of the accusation against him. La. Const. Art. I, § 13. That requirement is implemented by La. Code Crim. Proc. art. 464, which provides:

> The indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall state for each count the official or customary citation of the statute which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

La. Code Crim. Proc. art. 465 authorizes the use of specific short form indictments in charging certain offenses, including first-degree murder. We have consistently upheld the constitutionality of the short form indictment. State v. Baylis, 388 So.2d 713, 718-19 (La. 1980); State v. Liner, 373 So. 2d 121, 122 (La. 1979), and authorities cited therein.

In the present case, the State charged defendant by bill of indictment which read, in pertinent part, that "on or about the 1st day of JANUARY, 2003, at and in the - Parish, District and State aforesaid BRANDY AILENE HOLMES committed the offense of FIRST DEGREE MURDER . . . in that SHE . . . COMMITTED FIRST DEGREE

MURDER OF JULIAN L. BRANDON, JR. . . ." Trial Tr., vol. I, p. 14 (February 14,2003). Accordingly, the defendant was charged in compliance with La. Code Crim. Proc. art. 465(A)(3 I), which provides as a short form indictment for first degree murder: "A.B. committed first degree murder of C.D." See State v. Neslo, 433 So.2d 73, 81-82 (La. 1983). This argument lacks merit.

The penalty phase verdict form precluded the jury from considering certain types of mitigation circumstances by limiting it to those "offered" at trial. (Assignment of error 43).

The verdict form used in this case conformed to the statutory requirements of La. Code Crim. Proc. art. 905.7 and offends no constitutional principles by limiting the jury's consideration of mitigation to that "offered" by the defense. Nothing suggests the statutory language used in the verdict form misled the jury. Accordingly, defendant fails to show the verdict form introduced an arbitrary factor into its deliberations.

The penalty phase instructions erroneously suggested that jurors must find mitigating circumstances unanimously and beyond a reasonable doubt. (Assignment of error 44).

Viewing the verdict form and instruction as a whole, defendant's unargued claim appears baseless. This Court noted that "[t]he capital sentencing procedure does not establish any presumption or burdens of proof with respect to mitigating circumstances." State v. Jones, 474 So.2d 919, 932 (La. 1985), cert. denied, 470 U.S. 1178, 100 S.Ct. 2906, 90 L.Ed.2d 982 (1986); see also State v.

Sonnier, 402 So.2d 650, 657 (La. 1981). Thus, the defendant's assignment of error lacks merit.

The sentencing verdict form does not reflect a unanimous determination by the jury of each aggravating factor in violation of Ring v. Arizona, 536 US. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). (Assignment of error 45).

Ring requires only that jurors find beyond a reasonable doubt all of the predicate facts which render a defendant eligible for the death sentence, after consideration of the mitigating evidence. Id., 536 U.S. at 609, 122 S.Ct. at 2443. Although the sentencing form provided by La. Code Crim. Proc. art. 905.7 does not explicitly state that the jury has found the listed aggravating circumstances unanimously and beyond a reasonable doubt, our review of the record shows the trial court properly instructed the jury with regard to the requisite unanimity on whether the State had proved one or more aggravating circumstances beyond a reasonable doubt. Moreover, nothing in the record suggests the verdict actually rendered in the present case did not conform to the requirements of the law. Additionally, neither Ring nor Louisiana jurisprudence requires the jurors to reach their ultimate sentencing determination beyond a reasonable doubt. State v. Koon, 704 So. 2d at 772-73 ("Louisiana is not a weighing state. It does not require capital juries to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.")(citations omitted). This assignment of error lacks merit.

APPENDIX B

12/02/08

SUPREME COURT OF LOUISIANA

No. 2006-KA-2988

STATE OF LOUISIANA

VERSUS

BRANDY AILEEN HOLMES

CALOGERO, Chief Justice, dissents and assigns reasons.

I disagree with the majority's resolution of defendant's assignment of error No. 11 as it regards the issue of defendant's claimed mental retardation under La. Code Crim. Proc. art. 905.5.1 and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Although there was perhaps no legal basis for the district court to quash the indictment, as the majority points out, I believe this court should nevertheless remand the case to the district court and order that it conduct a hearing on whether trial counsel's failure to preserve the issue of mental retardation – by failing either to request that the jury decide the issue as authorized by La. Code Crim. Proc. art. 905.5.1(B) or to seek a jury instruction charging jurors that they could not return a death verdict if they determined that the defendant was mentally retarded – constitutes ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2053, 80 L.Ed.2d 674 (1984), and/or whether the defendant

qualifies as mentally retarded under La. Code Crim. Proc. art. 905.5.1 and *Atkins*, which set forth a non-waivable exemption from capital punishment for the mentally retarded offender. *See State v. Campbell*, 06-0286 (La. 5/21/08), 983 So.2d 810.

Although in *Campbell*, the majority concluded that a remand to the district court for it to consider the issue of mental retardation was not warranted because the record on appeal did not show reasonable grounds to question whether the defendant was mentally retarded and thus exempt from capital punishment, the appellate record in the instant case is quite different. In the case before us, Dr. Vigen and Dr. Williams both testified prior to trial that the defendant in their opinion met the definition of mental retardation set out in La. Code Crim. Proc. art. 905.5.1. Therefore, in my view, the record evidence regarding the defendant's mental retardation is sufficient, i.e., that there is a reasonable likelihood that she is mentally retarded, to justify a remand to the district court at this juncture, rather than to delay the issue for resolution in post-conviction proceedings.

Accordingly, I respectfully dissent from the majority opinion.

APPENDIX C

12/02/08

SUPREME COURT OF LOUISIANA

No. 06-KA-2988

STATE OF LOUISIANA

v.

BRANDY AILEEN HOLMES

On Appeal from the First Judicial District Court, For the Parish of Caddo

Honorable Scott J. Crichton, Judge

JOHNSON, J., dissents and assigns reasons:

I respectfully dissent. I believe it is error to relegate to post-conviction relief the pivotal issue of whether the defendant is mentally retarded and thus exempt from execution pursuant to the United States Supreme Court decision of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed.2d 335 (2002).

The defendant filed a "Motion to Quash Indictment," alleging that she suffered from "neurological and psychological deficiencies" that disqualified her from the death penalty based on the Supreme Court's reasoning in *Atkins*. The State argued in opposition that "a factual defense to any charge (such as minority or mental retardation at the time of offense) is not a proper ground for a

motion to quash" and that the matter should be decided by a jury.

An extensive pretrial hearing was held, and the defendant presented testimony from a psychiatrist and a psychologist, who both concluded that based on the definition set out in Louisiana Code of Criminal Procedure article 905.5.1, the defendant suffered from mental retardation. The trial court judge denied the defendant's motion to quash, concluding that "as a matter of law that there is no legal basis to grant the motion to quash."

A week before trial, the defendant filed a "Motion to Re-Urge the Motion to Quash the Indictment," which was denied, claiming that neuro-imaging of her brain revealed abnormalities and impairments further establishing that she suffered from fetal alcohol syndrome, which rendered her ineligible for execution under *Atkins*. The defendant also raised the issue at the penalty phase in argument for mitigation for sentencing when she presented evidence from three experts alleging that she suffered from fetal alcohol syndrome.

Although *Atkins* prohibits the States from executing mentally retarded persons, *Atkins* left to the States the task of developing guidelines for implementation. The Louisiana legislature has enacted LSA-C. Cr. P. art. 905.5.1, which prohibits the execution of the mentally retarded, provides procedures for raising and trying the issue, and defines mental retardation for the purpose of exemption from capital punishment. LSA-C.Cr. Pr. art. 905.5.1 reflects the legislature's preference that a jury determine all issues relevant to a capital sentencing determination in a single proceeding.

Specifically, Art. 905.5.1. provides, in pertinent part:

> A. Notwithstanding any other provisions of law to the contrary, no person who is mentally retarded shall be subjected to a sentence of death.
>
> B. Any capital defendant who claims to be mentally retarded shall file written notice thereof within the time period for filing of pretrial motions as provided by Code of Criminal Procedure Article 521.
>
> C. (1) Any defendant in a capital case making a claim of mental retardation shall prove the allegation by a preponderance of the evidence. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the state and the defendant agree that the issue is to be tried by the judge. If the state and the defendant agree, the issue of mental retardation of a capital defendant may be tried prior to trial by the judge alone.
> (2) Any pretrial determination by the judge that a defendant is not mentally retarded shall not preclude the defendant from raising the issue at the penalty phase, nor shall it preclude any instruction to the jury pursuant to this Section.

The majority concludes that the defendant has not preserved the issue of mental retardation for review because she failed to file notice, or request jury instruction regarding same. However, Article 905.5.1 must be scrupulously followed. The fact that

the trial court judge made pretrial determinations on the issue of the defendant's mental retardation, does not preclude the court's instruction to the jury so that the jury can make the ultimate determination. I believe that when the death penalty is sought, it is incumbent upon the trial court judge to insure that when the issue of a defendant's mental retardation is raised, the issue is determined by the jury as legislatively mandated.

CONCLUSION

For the reasons assigned, I would pretermit review of the merits of the defendant's conviction and sentence. Like *State v Dunn*, 2007-0878 (La. 1/25/08), --- So.2d ---- this case is now in a post-verdict procedural posture, and must be remanded.

APPENDIX D

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 005

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the **30th day of January, 2009**, the following action was the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING(S) DENIED:

2006-KA-2988 STATE OF LOUISIANA v. BRANDY AILEEN HOLMES (Parish of Caddo)
JOHNSON, J., would grant the rehearing

Supreme Court, U.S.
FILED
JUN 4 - 2009
OFFICE OF THE CLERK

No. 08-1358

In The
Supreme Court of the United States

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Brandy Holmes and Robert Coleman entered the Brandon home in rural Caddo Parish during the evening hours of New Year's Day 2003. After pushing their way into the front door of the Brandon residence, Julian Brandon, a retired Baptist preacher, was shot at near contact range under the chin with a .380 caliber handgun. The projectile separated into two pieces. One piece entered his brain, while the other piece exited the top of his head and was later recovered from the ceiling of the dining room adjacent to the front entryway. Julian Brandon collapsed. (Vol. 25, p. 5354, Vol. 26, p. 5528, Vol. 27, pp. 5642, 5674-5677, 5724-5733)

Mrs. Alice Brandon was taken to the rear bedroom and made to lie down. Alice Brandon was interrogated about her valuables and begged for her life. A pillow was placed over Mrs. Brandon's face, and she was shot in the head and left for dead. (Vol. 25, p. 5350, Vol. 27, p. 5731) The attention of the intruders was again focused on Reverend Brandon as they observed him struggling with his wounds, and they attacked Reverend Brandon a second time. At least three separate Chicago Cutlery style knives from the Brandon's kitchen were used in this second attack. Reverend Brandon received slashing cuts to his nose and face in addition to stabbing wounds on the top and rear of his head. The attack to the rear of Reverend Brandon's head was delivered with such force that one of the knives shattered; that knife was found in pieces at the scene. The offenders cut his

throat by multiple starting/stopping incisions starting from the front right, across the front of his neck and around to the back of his head. Reverend Brandon was repeatedly stabbed in the upper chest with wounds penetrating up to six inches, and was also stabbed in the back where a six-inch knife was found imbedded up to the handle. Reverend Brandon also had a large contusion from blunt force trauma on his forehead. (Vol. 26, pp. 5529-5534, Vol. 27, pp. 5734-5737)

Several days passed before the Brandons were discovered. A family friend, who missed the Brandons from regular phone contacts and attendance at morning and evening Sunday services went to the home and found the couple on January 5, 2003. (Vol. 25, p. 5345) Mrs. Brandon was still alive and was transported by helicopter to the hospital. (Vol. 25, pp. 5363-5365) Mrs. Brandon lived in a severely impaired state for almost six years as a result of the gunshot wound to the head, dying in October of 2008. (Vol. 28, pp. 5832-5838)

After the discovery of the crime scene, the Caddo Sheriff's Office investigation gained momentum with a call from persons at a nearby apartment complex. It was learned that shortly after New Year's Day Brandy Holmes was in a nearby apartment complex trying to sell jewelry and making statements about killing an old couple down the road by a church. (Vol. 25, pp. 5399-5400, 5405, Vol. 26, pp. 5480-5484) Detectives went to the Holmes' trailer, which was just around the corner from the homicide scene, and contacted Holmes, Coleman and other family members.

The group agreed to go to the detective office for interviews. Coleman denied involvement but displayed a cut on his right hand. (Vol. 26, pp. 5424-5428, 5484-5486, Vol. 27, pp. 5564, 5660) Holmes made several statements over the course of the next two days that implicated her and others as being involved in the homicide. (Vol. 26, pp. 5428-5433, 5504, 5508, 5516-5519, Vol. 27, pp. 5558-5561)

Holmes made at least six separate statements to authorities that related to the Brandon homicide. (Vol. 1, pp. 168-193, 250, Vol. 2, pp. 251-252, 363-461, 499, Vol. 3, pp. 508-522) In most of these statements, Holmes implicated herself and others to varying degrees. Of the four interviews that were taped, Holmes destroyed the one in which she unequivocally admitted her role as the shooter and active participant in all the events concerning both Reverend Brandon and Mrs. Brandon. Holmes destroyed this tape by sneaking it into the ladies' room and flushing the magnetic tape down the toilet, after substituting a blank tape in the stack of taped statements that had been left unsecured on a detective's desk. Investigators also noticed that after Holmes' bathroom visit, she was no longer wearing some of the jewelry they had observed earlier. (Vol. 26, pp. 5510-5514)

In all but her first interview with detectives, Holmes described various details of the homicide with great precision. She admitted that she had stolen her father's .380 handgun while visiting him in Mississippi. She repeatedly acknowledged her presence and involvement in the attack on the Brandons, and on

numerous occasions acknowledged her willingness to kill both Reverend and Mrs. Brandon. During her taped statements to Caddo deputies, Brandy Holmes admitted to bleaching her boots and burning her jacket stained with blood from Reverend Brandon's neck wound.

During her contact with investigators Holmes further revealed that on January 4, 2003, she took two of her nephews to view the bodies of Reverend Brandon and Mrs. Brandon. Her younger nephew later corroborated Holmes' account of this visit to the scene of the murder. The older nephew did not enter the residence, but Holmes' nine-year-old nephew went in with his aunt and saw Reverend Brandon lying in a pool of blood, and also heard Mrs. Brandon screaming from another room in the house. Holmes and her nephews were seen going to the Brandon residence together. The same witness observed the nephews hurriedly leaving the Brandon residence without their aunt. (Vol. 27, pp. 5614-5617)

The investigation revealed and the evidence showed a close link between Holmes and Coleman. Holmes and Coleman traveled from Mississippi, where they lived together as girlfriend and boyfriend, to Shreveport on Christmas Eve 2002. They were picked up by Holmes' mother and resided in her trailer while the couple was in Shreveport. They brought with them the .380 caliber handgun that belonged to Holmes' father. That handgun was determined to be the murder weapon both by Holmes' admission and by ballistics comparison of projectiles and shell

casings. (Vol. 26, pp. 5448-5459, Vol. 27, pp. 5674-5687)

The items that were known to have been stolen from the Brandon residence included jewelry, particularly a multi-colored bracelet, and bankcards. There was an attempt to use one of the Brandon's bankcards where an incorrect PIN was used at an ATM in a nearby convenience store. In addition, Holmes and Coleman were recorded minutes later and just up the street on a Hibernia bank surveillance video trying to use a bankcard, again with an incorrect PIN number. (Vol. 26, pp. 5462-5469, 5473-5476)

Many incriminating items were recovered from the Holmes' trailer where the two murderers had stayed. Among those items was a clear plastic food service glove found in the rain gutter of the trailer, containing a multi-colored bracelet and a pearl bracelet. (Vol. 26, pp. 5462-5468) Reverend Brandon's daughter identified the multi-colored bracelet as one she had given her mother some time earlier. (Vol. 26, pp. 5473-5476) A box of Subway food service gloves was recovered from the bedroom shared by Coleman and Holmes. (Vol. 26, p. 5489) The food service gloves had a diamond pattern consistent with patterns in blood transfer stains observed at the Brandon residence. (Vol. 27, pp. 5659, 5634) Additionally, a pillow was found in Holmes' bedroom with a bullet hole through it. (Vol. 26, pp. 5489-5494) That pillow was not the one used to cover Mrs. Brandon's face when she was shot, but was apparently a "practice" pillow.

In the same rain gutter that contained the multi-colored bracelet, three fired .380 cartridge casings were found. (Vol. 26, pp. 5462-5468) Investigators went to Holmes' father's residence in Mississippi. There her father took detectives to a location where he had fired the .380 handgun that was discovered missing at the time of Coleman and Holmes' departure from Mississippi. (Vol. 26, p. 5455) One of the cartridge casings found in the gutter was matched to a .380 cartridge casing recovered from that location in Mississippi. (Vol. 27, pp. 5684-5687) During analysis at the crime lab, Reverend Brandon's DNA was found on a swab taken from one of the fired cartridge casings found in the gutter. (Vol. 27, p. 5706) The portions of the .380 projectile that were recovered from Reverend Brandon's brain and dining room ceiling were matched to a projectile recovered from a tree pointed out by Holmes' father at the same location in Mississippi where investigators had recovered the cartridge casing. (Vol. 27, pp. 5674-5687)

Victim impact testimony from family members was introduced at the penalty phase. That testimony consisted of the two daughters testifying about the impact of this crime upon the Brandon family, and specifically upon Alice Brandon, as well as an edited video of Mrs. Brandon's existence in her daughter's care. (Vol. 29, pp. 6039-6058)

Evidence of the unadjudicated attempted burglary and potential murder of Mrs. Patricia Camp and the unadjudicated homicide of Terrance Blaze

were also admitted. On December 27, 2002, Holmes made a 911 call from her mother's house in reference to a gated community located very close to her mother's trailer known as "Nob Hill." The call was an attempt to gain an access code for the gate at the front of that community. (Vol. 29, pp. 5911-5917) No access code was given to Holmes during that call; however, Holmes was able to get into the neighborhood. Later that same day, Holmes, wearing a wig, attempted to get into the residence of Mrs. Patricia Camp by ringing the doorbell and asking to use the phone. Mrs. Camp spoke with Holmes, but denied her entry to her house. Mrs. Camp saw Holmes again two days later, again while Holmes was trying to gain entry to her residence. Mrs. Camp did not let Holmes in on this subsequent attempt either, and noticed a man was standing at the street waiting. (Vol. 29, pp. 5920-5924) Holmes admitted in a statement to authorities "If she would have opened that door, she would have been like Mr. Brandon" and "My plan was to get somebody on the hill that night." (Vol. 29, pp. 5928-5929)

Evidence of the Terrance Blaze homicide came into play when, as part of the Brandon investigation, Holmes directed authorities to Blaze's body. (Vol. 29, pp. 5933-5934, 5941-5944) High velocity blood spatter and other bloodstains matched to Blaze were found in Holmes' mother's vehicle and on Robert Coleman's right boot and right pants leg. (Vol. 29, pp. 5948-5955, 5985-5991) The stains indicate that Terrance Blaze was shot in Holmes' mother's vehicle, that Robert

Coleman was likely the driver at the time the shot was fired, and that the shot most likely came from the back seat. (Vol. 29, pp. 6029-6037) Holmes confessed in a letter to a prosecutor that she killed Terrance Blaze. (Vol. 29, p. 6011) Blaze was shot in the back of the head with a .380 caliber weapon and the bullet was recovered from his skull. The bullet had the same class characteristics as the bullet recovered from the tree in Mississippi. A cartridge casing found near where Blaze's body was dumped was matched to the cartridge case found in Mississippi. (Vol. 29, pp. 6001-6004)

Brandy Holmes and Robert Coleman were indicted for the first degree murder of Reverend Julian Brandon and the attempted first degree murder of his wife, Alice Brandon, as well as the first degree murder of Terrance Blaze. Holmes went to trial on the first degree murder of Reverend Brandon on February 6, 2006, in Caddo District Court and was convicted and sentenced to death. On direct appeal, the Louisiana Supreme Court affirmed petitioner's conviction and sentence, and rehearing was denied. *State v. Holmes*, 2006-2988 (La. 12/2/08), 5 So.3d 42, *rehearing denied*, 1/30/09. Petitioner's application for writs of certiorari followed.

SUMMARY OF ARGUMENT

As proportionality review is not required by the Eighth Amendment, there is no basis for federal review of a purely state court procedure.

Petitioner failed to raise many of her current complaints and supporting arguments in the state courts below.

CORRECTION OF PETITIONER'S MISSTATEMENTS

1. Prosecutorial "misconduct"

Petitioner asserts that the Louisiana Supreme Court failed to consider that the prosecutor stated at the codefendant's trial that he was the more culpable party, rather than petitioner. (p. 11, petitioner's writ application) This is a reworking of petitioner's claim on appeal that the State pursued inconsistent theories of prosecution, a claim that the Louisiana Supreme Court specifically found to be misleading:

> "As borne out in the record and her brief to this Court, defendant's focus on selective portions of the evidence presented and the State's closing arguments at both trials is misleading. As an initial matter, defendant concedes in her brief that at 'Coleman's trial, the prosecution argued that Coleman and Holmes both played an active role in the murder of Mr. Brandon [and] . . . charged Coleman as a principal in the alternative.'

Brief for the Appellant, p. 14. It is abundantly clear that the State was free to speculate which of the defendant's statements was the most truthful concerning her actual participation in the shooting of Julian Brandon. More importantly, during closing argument at the guilt phase, the State argued that even if the defendant was merely 'policing up the crime scene making sure nobody gets caught,' she was concerned in the commission of the offense and thus guilty as a principal. Trial Tr., vol. XXVIII, p. 5777 (Feb. 14, 2006).

During rebuttal closing at the guilt phase, the State further argued:

> We can't say which slice she inflicted, which stab she inflicted, which one of the times the trigger was pulled her finger was on it. But we can tell you that she was there helping, participating. It was too much for one person and that she wanted them dead because she didn't wear a mask and all the other things we've told you. When you realize that she had the specific intent to kill, she was involved in the killing and as the defense has conceded the victims were over 65, it was during an armed robbery, a burglary, and there was more than one person, the only appropriate verdict is guilty as charged of first degree murder. Trial Tr., vol. XXVIII, pp. 5812-13 (Feb. 14, 2006).

Similarly at the penalty phase, rather than arguing that defendant was the shooter, as

she claimed in one of her statements, counsel for the State argued:

> . . . I don't think we're ever going to have an answer to whose hand the gun was in as it relates to the Brandons and whose particular hand the knife was in as it relates to the Brandons, you have seen what the evidence does show. And that's simply coming back to this concept that they participated part and parcel together from start to finish. Trial Tr., vol. XXX, p. 6236 (Feb. 16, 2006)."

(Pp. 37a-38a of petitioner's appendix, or *see State v. Holmes, supra*, 5 So.3d at 64-65)

The duty to represent a client zealously does not excuse a lack of candor with the Court. *Nix v. Whiteside,* 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

2. No clear diagnosis of FAS was agreed upon by petitioner's expert witnesses

Petitioner also makes some telling omissions from her claims that her mitigating evidence was "compelling." At a pretrial hearing where petitioner attempted to prove she was mentally retarded, one of petitioner's expert witnesses, psychiatrist Dr. Richard Williams diagnosed her with Fetal Alcohol Syndrome (FAS). Dr. Williams confidently predicted that petitioner would be found to have frontal lobe damage. (Vol. 19, pp. 4153, 4162) His testimony was deflated

during the penalty phase when Dr. James Patterson's analysis of the MRI and PET scan test results did not support this prediction. (Vol. 30, pp. 6199-6206)

The State addresses this matter in more depth later in this opposition brief.

3. Louisiana Supreme Court DID review potential racial factors

As for petitioner's complaints that "Louisiana's review also fails to consider the introduction of invidious factors such as the race of the defendant and victim," petitioner did not raise this complaint in the state court. Indeed, she could hardly do so when the Louisiana Supreme Court specifically addressed the question of potential racial discrimination in its opinion, noting that petitioner and her victims were of the same race. *Holmes,* at 95-96.

ARGUMENT

I. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE LOUISIANA SUPREME COURT CONDUCT PROPORTIONALITY REVIEW OF CAPITAL CASES

Petitioner advances a number of arguments to support her claim that the Louisiana Supreme Court failed to make a sufficient review of similar capital cases. None of them are convincing, and some are inaccurate.

Petitioner relies heavily on Justice Stevens' statement issued in relation to the writ denial of *Walker v. Georgia*, 129 S.Ct. 453 (2008). Although acknowledging that Walker did not present his claims in the state court, thereby precluding review, Justice Stevens expressed his views regarding state proportionality review in what can only be regarded as *dicta*, prompting Justice Thomas's concurrence.

Justice Thomas's concurrence with the denial of the writ makes clear, however, that "Proportionality review is not constitutionally required in any form." *Walker v. Georgia*, 129 S.Ct. 481, 483 (2008). Louisiana, like Georgia, "simply has elected, as a matter of state law, to provide an additional protection for capital defendants." *Ibid.* As there is no constitutional mandate, there is no basis for this Court to review the Louisiana Supreme Court's proportionality review process. Nor does *Walker*, or petitioner's claim, raise a new issue. This Court determined twenty-five years ago that certiorari review of such state procedures is not federally mandated:

> "Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required." *Pulley v. Harris*, 465 U.S. 37, 50, 104 S.Ct. 871, 879, 79 L.Ed.2d 29 (1984).

Petitioner attempts to turn back the clock by claiming that amendments to Louisiana's capital punishment plan look "more and more" like the

mandatory death penalty plan condemned in *Furman v. Georgia,* 408 U.S. 238 (1972). This argument was not raised in the Louisiana Supreme Court, and cannot serve as the basis for review in the instant case. *Walker,* 129 S.Ct., at 454.

Moreover, petitioner's argument is disingenuous. Pre-*Furman*, a mandatory death sentence was the norm in Louisiana as well as Georgia. There can be no rational argument that more recent changes to the first degree murder statute have returned capital cases to a mandatory footing. While some elements of first degree murder may have been added, petitioner ignores the erosion of the death penalty that has occurred through the prohibition of the execution of the mentally retarded and the juvenile murderer. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

Petitioner claims that "far more individuals are eligible for a possible death sentence today than when this Court last validated the Louisiana capital sentencing scheme." Petitioner, however, is not one of those individuals: in the instant case, two of the three aggravating circumstances found in petitioner's case have been part of the statute since 1979. La. R.S. 14:30 has since that time defined first degree murder as an intentional killing committed during the course of an armed robbery, and/or an intentional killing committed when the offender has the intent to kill or inflict great bodily harm upon more than one person, among other elements. Louisiana Acts 1979, No. 74.

The remaining aggravating circumstance returned by the jury in petitioner's case, the intentional killing of a victim over the age of sixty-five, was added by a 1992 amendment. La. Acts 1992, No. 296. In light of the fact that even an invalid aggravating circumstance will not undermine a death sentence where there are valid aggravating circumstances remaining, any unrelated additions to Louisiana's first degree murder statute are irrelevant to petitioner's case. *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *State v. Anderson,* 2006-2987 (La. 9/9/08), 996 So.2d 973, *rehearing denied, cert. denied,* 129 S.Ct. 1906; *Watson v. Blackburn*, 756 F.2d 1055 (5th Cir. 1985), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 703, *rehearing denied,* 478 U.S. 1028, 106 S.Ct. 3341, 92 L.Ed.2d 749.

The State presented evidence of petitioner's murder of another person within a few days of the murder of Julian Brandon, and of her efforts to gain entry at another home a few days before, including her admission that if that homeowner had opened the door, she would have been dead. Louisiana Code of Criminal Procedure Article 905.2.A provides that "The sentencing hearing shall focus on the . . . character and propensities of the offender." Nothing could be more relevant for a jury considering whether to impose the death sentence.

Also raised for the first time in petitioner's application for certiorari is the claim that Louisiana's sentencing plan fails to "harness" jurors' discretion because it does not require jurors to "weigh" aggravating versus mitigating circumstances, and does not

impose a standard of proof on the jury's determination of sentence. Petitioner has not only failed to allege this claim in the state court, she has also failed, and failed utterly, to show that uniformity of state sentencing schemes is required by the Constitution.

Petitioner is also far from the mark when she complains that the Louisiana Supreme Court acted unconstitutionally by allowing more information be given to jurors during the penalty phase. As early as *Gregg v. Georgia,* 428 U.S. 153, 203-204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976), this Court rejected an attack on the Georgia statute because of the "wide scope of evidence and argument allowed at presentence hearings." The joint opinion stated:

> "We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. . . . So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."

In *Payne v. Tennessee,* 501 U.S. 808, 821, 111 S.Ct. 2597, 2606, 115 L.Ed.2d 720 (1991), the Court specifically reversed *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *South*

Carolina v. Gathers, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), which had imposed limits on evidence and argument the prosecution could present during the penalty phase:

> "Under our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests *with the States.*" *Payne, supra,* emphasis added.

There are some limitations, of course, but "[b]eyond these limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos,* 463 U.S. 992, 1001, 103 S.Ct. 3446, 3453, 77 L.Ed.2d 1171 (1983), *Payne, supra.*

Payne cut petitioner's claims out from under her feet in another respect: the complained-of expansion of aggravating factors and crimes which serve as the basis for first degree murder:

> "'Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.' *Blystone v. Pennsylvania*, 494 U.S. 299, 309, 110 S.Ct. 1078, 1084, 108 L.Ed.2d 255 (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt

> needs . . . victim impact evidence serves entirely legitimate purposes."

Payne, 501 U.S. at 824-825.

Besides these complaints about the victim impact testimony and the addition of aggravating factors, petitioner also complains about the evidence of other crimes which were presented as part of the "character and propensities" evidence required during the penalty phase.

> "A wide range of evidence is admissible on literally countless subjects: 'We have Long recognized that [f]or the determination of sentences, justice generally requires . . . that there be taken into account the *circumstances of the offense* together with the *character and propensities of the offender.*' *Gregg*, *supra*, 428 U.S. at 189, 96 S.Ct. at 2932 (emphasis added)."

Zant v. Stephens, *supra*, 462 U.S. at 900, 103 S.Ct. at 2755.

Petitioner's claims are without merit. There is no constitutional basis for review of the Louisiana Supreme Court's proportionality review of petitioner's death sentence.

II. THE LOUISIANA SUPREME COURT CONDUCTED A THOROUGH PROPORTIONALITY REVIEW

A fact which has no Eighth Amendment implications whatsoever

A. The Louisiana Supreme Court conducted a state-wide review of home invasion capital verdicts

Petitioner complains that the Louisiana Supreme Court erred in considering only first degree murder cases where the death penalty was actually returned in performing its proportionality analysis. As noted above, the Eighth Amendment does not require proportionality review, and the States are free to omit or include such a review of death penalty cases. The fact that one state may include the consideration of cases where the death penalty was not returned does not mean that every state must employ the same methodology. As *Harris* demonstrates, California has no proportionality review at all.

The Louisiana Supreme Court conducted a statewide analysis of home invasion first degree murder cases, not being content to rely on only those in Caddo Parish. *Holmes, supra,* 5 So.3d at 96. On her direct appeal, petitioner attempted to draw a comparison between eleven robbery first degree murder cases in Caddo Parish where the death penalty was returned and ten robbery first degree murder cases where a life sentence was imposed (either by agreement of the jury or their inability to reach a sentence

verdict, which triggers an automatic life sentence under La. C.Cr.P. Articles 905.6, 905.8). Petitioner's complaints are inconsistent, to say the least. On the one hand she complains that the Louisiana Supreme Court did not consider enough of one kind of case, while on the other she complains that they considered cases state-wide.

The comparisons actually made by the Louisiana Supreme Court are more relevant than those advanced by petitioner, as the cases the court used are so much closer to the facts of the instant case: "This Court has observed that Louisiana juries appear especially prone to impose capital punishment for crimes *committed in the home." Holmes,* 5 So.3d at 97, emphasis added. Undertaking the type of district-specific analysis used by petitioner in the state court, of the now 43 first degree murder cases tried in Caddo Parish since 1976, there were eight which involved home invasion robberies. Of those, seven defendants received the death penalty, the most recent being Felton Dorsey, whose death penalty was returned by the jury May 28, 2009.[1] (*See* State's

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[1] Listing of capital cases in Caddo Parish:

1. *State v. Nathaniel Code*, 627 So.2d 1373 (La. 1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1873, 128 L.Ed.2d 490, *rehearing denied*, 512 U.S. 1248, 114 S.Ct. 2775, 129 L.Ed.2d 887

2. *State v. Robert Coleman, reversed and remanded*, 2006-518 (La. 11/02/07), 970 So.2d 511, *rehearing denied*, 01/07/08

(Continued on following page)

Appendix 1.) The sole case involving a home invasion robbery where the death penalty was not returned was in 1976.[2] (*See* State's Appendix 1, p. 12.) Under the very type of analysis which petitioner urges, that being the inclusion of similar cases where the death penalty was not returned, it can be clearly seen that petitioner's death sentence was neither freakish nor arbitrary.

B. The weight to be given mitigating circumstances is for the trier of fact

Petitioner complains that the Louisiana Supreme Court did not consider mitigating circumstances in its proportionality review. There is no Eighth Amendment requirement that it do so. That task is for the

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3. *State v. Michael Cooks*, 97-0999 (La. 9/9/98), 720 So.2d 637, *cert. denied*, 526 U.S. 1042, 119 S.Ct. 1342, 143 L.Ed.2d 505, *rehearing denied*, 526 U.S. 1128, 119 S.Ct. 1789, 143 L.Ed.2d 816

4. *State v. Felton Dorsey*, 1st J.D.C., Docket No. 251,406

5. *State v. Darrell Dewayne Draughn*, 05-1825 (La. 01/17/07), 950 So.2d 583, *rehearing denied*, 3/30/07, *cert. denied*, ___ U.S. ___, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007)

6. *State v. Cedric Edwards*, 97-1797 (La. 7/2/99), 750 So.2d 893, *cert. denied*, 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421

7. *State v. Brandy Aileen Holmes*, 2006-2988 (La. 12/2/08), 5 So.3d 42, *rehearing denied*, 1/30/09

[2] *State v. John L. Donaldson*, 391 So.2d 1182 (La. 1980)

jury to do, and their determination was a reasonable one. The mitigating evidence was not nearly as clear-cut or "compelling" as petitioner presents it to the Court in her application, as noted above.

According to Dr. James Patterson, there is as yet not much objective statistical image analysis data on people with FAS, and he was unable to say that any physical brain defect caused petitioner to commit criminal acts. (Vol. 30, pp. 6201-6205) Moreover, it was not proven by a preponderance of the evidence that petitioner was either mentally retarded or has FAS. Dr. Patterson testified at the penalty phase about his analysis of the MRI and PET scans of petitioner's brain, and found that, although some brain abnormalities were found which were consistent with what was expected in "published results" on FAS, petitioner did not have other expected brain abnormalities. (Vol. 30, pp. 6200, 6202-6206) Dr. Patterson was unable to "reach a conclusion either way." (Vol. 30, p. 6205)

As for petitioner's claims of mental retardation, petitioner never filed the required notice of a claim of mental retardation, and her plea of "not guilty and not guilty by reason of insanity" was withdrawn after the report of the sanity commission was received. La. C.Cr.P. Article 905.5.1.B (Vol. 11, pp. 2350-2352, 2356-2365, Vol. 18, pp. 4046-4049) Her expert witnesses were similarly equivocal on the retardation issue presented at a motion to quash.

Psychologist Dr. Mark Vigen's opinion apparently morphed between his original report to defense counsel and the motion to quash. In his first report to defense counsel, Dr. Vigen had found that appellant was not mentally retarded. (Vol. 11, pp. 2393-2395) By the time of the hearing, Vigen testified that appellant was mentally retarded by the standards set out by La. C.Cr.P. Article 905.5.1, but not under the DSM-IV, and that he therefore could not diagnose her as mentally retarded. (Vol. 19, pp. 4194, 4203, 4206) Although Dr. Vigen testified at the motion to quash that petitioner was limited in two or more adaptive skills (Vol. 19, p. 4194), at the penalty phase he found that petitioner was "street smart," could drive, buy groceries, and was "responsible for her actions," competent and sane. (Vol. 30, pp. 6111, 6115, 6128)

Petitioner has been subjected to much psychological testing throughout her life. Those tests diagnosed petitioner as having depression, developmental disorders, oppositional defiant disorder, post-traumatic stress disorder and various learning disabilities and personality disorders. (*See* chart at Vol. 12, pp. 2609-2630.) None of them found her to be mentally retarded. This is not surprising, as her full scale IQ scores ranged from 74 to 78. An IQ of 70 or below is generally regarded as an indicator of mental retardation. (DSM-IV, p. 49)

Petitioner's other expert was also less than conclusive about whether she is mentally retarded. Dr. Richard Williams opined that appellant is mentally retarded under the definition of La. C.Cr.P. Article

905.5.1, but testified that he could not diagnose her as mentally retarded because she did not fit the criteria set out in the DSM-IV, rather she has a learning disorder. (Vol. 19, pp. 4154-4155, 4171) At the penalty phase, Williams testified that petitioner has "borderline intellectual functioning." (Vol. 30, p. 6141)

Conflicting testimony of expert witnesses who are unable to reach conclusions or make diagnoses about claimed mental defects hardly constitute "compelling" mitigating evidence.

C. The Louisiana Supreme Court conducted a state-wide review of similar cases

Petitioner complains that the Louisiana Supreme Court proportionality review "employs an inter-district review in only some cases, without a consistently-articulated justification for the inconsistency." In petitioner's case, however, the court employed a state-wide review of capital cases involving home invasion robberies, attacks on more than one victim, and attacks on elderly victims. *Holmes,* at 97-98.

As noted above, if the court had chosen to conduct a Caddo-Parish-only review of home invasion cases, it would have been revealed that of the seven capital trials for home invasion robberies that had been tried in Caddo Parish at the time of the appeal, six defendants received the death penalty.

In her direct appeal, petitioner limited her own comparison of first degree murder cases to those tried in Caddo Parish. Despite this, the Louisiana Supreme Court reviewed cases from other districts throughout the state. On rehearing, petitioner then complained that the court conducted a state-wide proportionality review. (Petitioner's Application for Rehearing, p. 10) Petitioner has not stated a constitutional basis for micro-managing whether state supreme courts may conduct district-only or must conduct state-wide review of similar cases, for those states which have proportionality review.

As for petitioner's claims that the Louisiana Supreme Court did not conduct a review for arbitrary factors, the State has previously addressed the inaccuracies in a portion of this claim, regarding potential impact from racial discrimination. There remains petitioner's new claim that the judicial district in which the case arose was an "arbitrary factor" that should have been considered in the court's proportionality review. The State cannot but note that the district in which the case arose was not due to any arbitrary action by the State, judge or jury, but falls upon the murderer herself. She chose the location as well as the victims. Petitioner has failed, moreover, to enlighten the reader as to just what this has to do with proportionality.

Petitioner even goes so far as to complain about the content of the Sentencing Memorandum filed by the State. Such complaints about whether the State included details of her mental illness claims are

absurd. Federal courts are not "super" state courts acting to correct interpretations of state law. Claims that the trial court improperly applied state law do not constitute an independent basis for federal review. *Narvaiz v. Johnson*, 134 F.3d 688, 695 (5th Cir. 1998), *cert. denied*, 524 U.S. 947, 118 S.Ct. 2364, 141 L.Ed.2d 731.

Under Louisiana Supreme Court Rule 28,[3] every capital defendant is required to file her own sentence

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[3] Also titled as La. C.Cr.P. Article 905.9.1, Section 4.

Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(Continued on following page)

review memorandum, and may include whatever facts she deems relevant in that document. In fact petitioner did file such a memorandum, included as State's Appendix B. The even-handedness of Rule 28 renders petitioner's complaints about the content of the State's Capital Sentencing Memorandum beside the point: Rule 28 permits petitioner to correct any perceived flaws or omissions in her own memorandum. This ensures that information petitioner deems relevant will be seen by the reviewing court, satisfying any due process concerns. It does not, however, permit petitioner, under the guise of a constitutional claim, to require this Court dictate to the State what to include in the State's memorandum. Once again, federal courts do not operate as "super" state courts, and petitioner's complaints were properly rejected by the Louisiana Supreme Court, based on state law. Petitioner's complaints are without merit.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

CONCLUSION

Respondent State of Louisiana shows that the writ should not be granted in the instant case:

I. The Louisiana Supreme Court did not err in affirming petitioner's sentence on appeal. Their thorough review of capital convictions throughout the state supported the finding that the sentence was not disproportionate.

II. More importantly, there is no Eighth Amendment basis for federal review of proportionality analysis when such analysis is not required by the Constitution.

WHEREFORE, the State of Louisiana prays that Brandy Holmes's application for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX 1

LOUISIANA SUPREME COURT
NO. 2006-KA-2988

STATE OF LOUISIANA

V.

BRANDY AILEEN HOLMES

ON AUTOMATIC APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF CADDO, STATE OF LOUISIANA, NUMBER 226,819, CRIMINAL DOCKET HONORABLE SCOTT J. CRICHTON, DISTRICT JUDGE

SENTENCE REVIEW MEMORANDUM
ON BEHALF OF THE
STATE OF LOUISIANA, PLAINTIFF-APPELLEE

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NOW INTO COURT, through the undersigned assistant district attorney, comes the State of Louisiana, which pursuant to Rule 28, § 4 of the Rules of this Court, respectfully presents this Sentence Review Memorandum:

The following is a list of first-degree murder indictments returned by the Caddo Parish Grand Jury, First Judicial District, State of Louisiana, since January 1, 1976, where the same verdict was returned by a petit jury in each case.

(1) *State v. Solomon Birdsong, Jr.*, 452 So.2d 1236 (La.App.2d Cir. 1984), *writ den.* 457 So.2d 1200; Docket No. 120,403, First Judicial District Court.

Solomon Birdsong, Jr., was indicted for the first-degree murder of a Pizza Hut employee. A jury found Birdsong guilty as charged. Following a sentencing hearing, the jury recommended that the defendant be incarcerated for the remainder of his life without benefit of probation, parole or suspension of sentence.

In February of 1982, Solomon Birdsong, accompanied by his brother Philander, placed a Pizza Hut employee in the "cooler" of the restaurant in the course of an armed robbery. After leaving the victim in the cooler, Birdsong decided to eliminate the only witness who could identify him. He reopened the door to the cooler, raised a .32 caliber automatic pistol and fired a bullet into the head of the victim. He closed the door, but reopened it thinking the victim was still

alive. He then fired another shot into the victim to make sure that she was dead. Birdsong then completed the robbery by removing a bag of money from the cash register and fleeing to his automobile where his brother Philander waited for him.

The prosecution urged as an aggravating circumstance that the murder occurred during the commission of an armed robbery and that it was committed in an especially cruel and heinous manner. In mitigation the defense argued that Birdsong was insane at the time of the offense. Further, the defense urged the jury to consider Birdsong's youth (19 years of age), his lack of a prior criminal history and his good family background. (Birdsong was the son of a prominent Shreveport educator.)

(2) *State v. Arthur Lee Brown*, 478 So.2d 600 (La.App.2d Cir. 1985); No. 123,619-D, First Judicial District Court.

Arthur Lee Brown and two co-defendants were indicted by a Caddo Parish grand jury for the first-degree murder of Charles Moss. After trial by jury, Brown was found guilty as charged. Because the jurors were unable to unanimously agree on the death penalty, Brown was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

On the evening of March 26, 1983, Charles Moss was abducted by three black males while in his automobile waiting to pick up an order from a

Wendy's restaurant in north Shreveport. Brown and his co-conspirators, Gregory Means and Terrell Porter, drove Moss to a secluded area of town and robbed him of $5. When Moss attempted to escape his abductors he was pursued by Brown and Porter. Moss was then stabbed approximately 35 times with a butcher knife. He was nearly decapitated. His body was weighted down with cement blocks and dumped into a nearby pond. His automobile was burned beyond recognition so as to leave no trace of their actions.

The State argued as aggravating circumstances that the defendant was engaged in the perpetration of an armed robbery and an aggravated kidnapping at the time the offense was committed. The State also argued that the offense was committed in an especially cruel, heinous and atrocious manner.

In mitigation, the defense contended that the evidence of Brown's participation was so tenuous that the jury could not comfortably return the death penalty. The defense argued that Terrell Porter was engaged in a frenzied overkill at the time of the murder and that it was he, not Brown, who was more culpable. The defense also argued in mitigation Brown's youth (19 years of age) and that he had no substantial prior criminal record.

Other pertinent facts in this case include the jury's awareness that Porter had been permitted to plead guilty to first-degree murder without capital punishment, and that Means, the prosecution's chief

witness, had pled guilty to armed robbery and accessory after the fact to first degree murder.

(3) *State v. Charles Caldwell*, 388 So.2d 1163 (La. 1980) (per curiam); Docket No. 111,554, First Judicial District Court.

Charles Caldwell was indicted by a Caddo Parish grand jury for the first degree murder of Henry Simmons in violation of La. R.S. 14:30. After a three day trial, the jury unanimously convicted Caldwell of First Degree Murder. The trial court then sentenced Caldwell to life imprisonment without benefit of probation, parole or suspension of sentence.

The facts leading to Caldwell's conviction and sentence were as follows. Pamela Caldwell moved back into the home of her parents following a legal separation from the defendant. On the evening of June 16, 1979, Henry Simmons, age 55, picked up Pamela and returned to her home in the early morning hours of the following day. While Ms. Caldwell and Simmons were parked in front of Ms. Caldwell's home, Charles Caldwell emerged from some bushes (where he had spent the night awaiting Pamela's return) carrying a rifle. Thereupon he shot Simmons seven times, killing him.

Although the offense arose out of circumstances which indicated that the murder was s specific intent killing, the State chose not to seek the death penalty because the killing did not involve any underlying aggravating circumstances.

(4) *State v. Field Calhoun*, 554 So.2d 127 (La. App. 2d Cir., 1989), *writ denied*, 558 So.2d 601, Docket No. 136,984; First Judicial District Court.

Field Calhoun was indicted for the first-degree murder of Robert Smith. At trial the jury found Calhoun guilty as charged, but was unable to agree whether death or life imprisonment should be imposed. The district court accordingly sentenced Calhoun to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence.

On December 20, 1986, Mr. and Mrs. Robert Smith stopped at a grocery store on the way home from work. Mrs. Smith went inside and used a $100 bill to make some purchases. Field Calhoun was in the store and saw the $100 bill. When Mrs. Smith left the store, Calhoun grabbed her, put a gun to her head and demanded her money. Mr. Smith got out of the car to help his wife and was shot twice by Calhoun.

Calhoun testified he had been using marijuana and cocaine that day and that he had been drinking steadily since the day before. Calhoun also claimed that he accidentally bumped into Mrs. Smith and was only trying to stop Mr. Smith when, he fired. Calhoun was 17 years of age at the time of the offense.

(5) *State v. Laderick Campbell*, 2006-286, Louisiana Supreme Court, Docket No. 220,544, First Judicial District.

Laderick Campbell was convicted of first degree murder committed in the course of an armed robbery and sentenced to death. On February 11, 2002, 51 year old Kathy Parker was working as a cashier at the Magnolia Club in Rodessa in rural Caddo Parish. At about 9:30 p.m., two black males, later identified as twenty-two year old Laderick Campbell and James "Peanut" Washington, entered the club. A video surveillance camera recorded the events that transpired.

Campbell, who was armed with a shotgun, demanded cash from Mrs. Parker, Witnesses testified that she said she'd give him whatever he wanted, and begged him not to shoot her. When Mrs. Parker opened the cash register, Campbell reached over and grabbed the money. He then shot Kathy Parker once in the chest. Kathy Parker died later that evening at LSU Medical Center. Campbell and Washington fled in a vehicle driven by Lakischa "Keeta" Holloway, with Virginia Burkett as a passenger. Both young women testified for the prosecution. As Campbell got in the car, he remarked "I shot the white bitch in the neck."

A Caddo Parish Detective reviewed the video surveillance tape from the Magnolia Club and recognized both men. He had dealt with them since they were juveniles, and he knew they associated

with each other. The next day the same Caddo detective received a phone call from the Cass County, Texas, Sheriff's Office, passing on information regarding the identity and location of the robbery and murder suspects. Campbell was arrested in Kildare, Texas, on February 12, 2002, on Caddo's warrants for first degree murder and armed robbery. Campbell denied any knowledge of the crime, and claimed he was at his mother's house in Springhill at the time.

After a thorough colloquy, Campbell represented himself at trial, with standby counsel from the Caddo Parish Public Defenders Office, who then conducted the penalty phase at Campbell's request. The State presented victim impact testimony from Kathy Parker's husband, daughter and employer/friend. Campbell presented testimony that he would be a model prisoner in the general population, but this was rebutted by testimony of Campbell's unprovoked attack with a chair on another inmate.

(6) *State v. Nathaniel Robert Code, Jr.*, 627 So.2d 1373 (La. 1993), *certiorari denied* 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490, *rehearing denied* 512 U.S. 1248, 114 S.Ct. 2775, 129 L.Ed.2d 887; Docket No. 138,860 – A, First Judicial District Court.

Nathaniel Code was indicted for eight counts of first-degree murder, committed over four years. Code was tried for the murders of Vivian Chaney, Carlitha Culbert, Jerry Culbert and Billy Joe Harris ("the Chaney family"), convicted and sentenced to death on

each of the four counts. The jury found as aggravating circumstances that Code had knowingly created a risk of death to more than one person, that three of the murders had been committed in a particularly heinous, atrocious or cruel manner and that Code was engaged in the perpetration or attempted perpetration of aggravated burglary, armed robbery, first-degree robbery or simple robbery. This matter is currently pending post-conviction relief.

The Chaney family was murdered on July 19, 1985. Billy Joe Harris was shot five times and had his throat cut. Jerry Culbert was shot once in the head as he slept. Vivian Chaney's face was brutally beaten and she was forced to sit in her daughter's blood after Code slashed Carlitha's throat. Vivian Chaney was then strangled by use of a ligature and/or drowned in the bathtub where her body was found. Code's palm print was found on the bathtub. After murdering Vivian Chaney, Code returned to Carlitha who had been crawling on the floor. He slashed her throat repeatedly, nearly decapitating her. Each of the three stabbing victims was bound with electrical cord or shoelaces and all but Billy Joe Harris were sight impaired or legally blind. Code was charged after his fingerprints were matched to the latent print found on the bathtub.

At trial the State also proved that Code had murdered four other people. Evidence as to these murders was admitted to show system and identity. During the penalty phase, the State showed that

Code had previously pled guilty to attempted aggravated rape, reduced from aggravated rape, an incident in which he threatened the victim with a knife, and threatened to kill her children. Code served fifteen years at hard labor for the attempted aggravated rape. The first of the eight murders was committed eight months after his release.

(7) *State v. Robert Glen Coleman*, 2006-518, Louisiana Supreme Court, Docket No. 226,818, First Judicial District.

Robert Coleman and Brandy Holmes were arrested by the Caddo Sheriff's Office and later indicted for the first degree murder of Rev. Julian Brandon and the attempted first degree murder of his wife, Alice Brandon, as well as the first degree murder of Terrance Blaze. Coleman was convicted and sentenced to death.

Coleman and Holmes entered the Brandon home in rural Caddo Parish during the evening hours of New Year's Day 2003. After pushing their way into the front door of the Brandon residence, Julian Brandon, a retired Baptist preacher, was shot at near contact range under the chin with a .380 caliber handgun. The projectile separated into two pieces. One piece entered Julian Brandon's brain. The other piece exited the top portion of his head and was later recovered from the ceiling of the dining room adjacent to the front entryway. Brandon collapsed.

Mrs. Brandon was taken to the rear bedroom and shot in the head and left for dead. Reverend Brandon was then attacked again by the intruders. At least three separate Chicago Cutlery style knives from the Brandons' kitchen were used in this second attack. Brandon received cuts to his nose, face and top of the head. Rev. Brandon's throat was cut by multiple starting/stopping incisions from the front right of his neck, across the front and around to the back of his head. He was stabbed four times in the upper chest with wounds that penetrated up to 6 inches. He was also stabbed in the back where a six-inch knife was found imbedded up to the handle in his back. Rev. Brandon also had a large contusion from blunt force trauma on his forehead. Pieces of the shattered knife blades from these knives were found at the scene. When the scene was discovered on January 5, 2003, Mrs. Brandon was still alive and was transported by helicopter to the hospital. Mrs. Brandon continues to be in an impaired state as a result of the gunshot wound to her head.

The Caddo Sheriff's Office investigation started off quickly with a call from persons at a nearby apartment complex. It was learned that shortly after New Year's Day Brandy Holmes was in a near-by apartment complex trying to sell jewelry and making statements about killing an old couple down the road by a church. Detectives went to the Holmes' trailer, which was just around the corner from the homicide scene, and contacted Holmes, Coleman and other family members. The group agreed to go to the

detective office for interviews. Coleman denied involvement but displayed a small cut on his hand.

The investigation revealed and the evidence showed a close link between Coleman and Holmes. Coleman and Holmes traveled from Mississippi, where they lived together as boyfriend/girlfriend, to Shreveport on Christmas Eve, 2002. They were picked up by Holmes' mother and resided in her trailer while the couple was in Shreveport. They brought with them a .380 caliber handgun, which they had acquired from Holmes' father.

Coleman was seen at a New Year's Eve party at Holmes' trailer with a pistol and overheard making inquires about where he could "hit a lick" (i.e, a robbery). The next evening the home invasion robbery and murder of Rev. Brandon occurred. Among other thing, jewelry, particularly a multicolored bracelet, and bankcards were taken from the home. Coleman and Holmes were recorded on a Hibernia bank surveillance video a short time later trying to use a bankcard with the incorrect pin number.

Several days passed before the Brandons were discovered. A family friend who missed the Brandons' regular phone contacts and attendance at morning and evening Sunday services went to the home and found the couple. Bloody footprints were found during the processing of the scene, which was occurring simultaneously with the interviews of the persons from the Holmes' trailer. As a result, Coleman's boots were seized. Pants from a duffle bag carried by

Coleman were seized later. Preliminary tests showed positive for bloodstains on these items. DNA analysis later confirmed that Rev. Brandon's blood was on the boots worn and seized from Coleman in a distinctive blood spatter pattern. Blood from the unrelated murder of Terrance Blaze was also found on Coleman's pants. This information was presented during the penalty phase.

The blood pattern of very small blood spots seized from Coleman's boots revealed that he had to be standing close to Brandon when the blood transfer occurred. This type of blood spatter comes from fast moving blood, such as from gunshots. It was not the type of blood pattern that would come from walking through a bloody area. Coleman was arrested for murder after the interviews that evening and the next morning.

Coleman was placed in an intake cell with two other inmates. Coleman made statements relating details of how he and his girlfriend, who he was "training" and "putting to the test," robbed and killed an old couple. The inmates immediately contacted the guards. They were separated from Coleman and reported the statements to detectives

Many incriminating items were recovered from the Holmes' trailer where the two murderers had stayed. Most importantly, a clear plastic food service glove was found in the rain gutter of the trailer. A multi-colored bracelet and a pearl bracelet were found in the glove. Three empty fired .380 shell

casings were found in the gutter near the glove. Rev. Brandon's daughter identified the multi-colored bracelet as one she had given her mother some time earlier and which was missing from the home after the attack. The shell casings were matched to .380 shell casings recovered from Mississippi where Holmes' father showed detectives where he had fired a .380 handgun that was missing at the time of Coleman and Holmes' departure from Mississippi just prior to the murder. The portions of the .380 projectile that were recovered from Rev. Brandon's brain and dining room ceiling were matched to a projectile recovered from a tree at the same location in Mississippi where police had recovered shell casings pointed out by Holmes' father.

Victim impact testimony from family members and a family friend was introduced at penalty phase. Evidence of Coleman's prior convictions, including armed robbery, and the unadjudicated homicide of Terrance Blaze were also admitted, Coleman's case is currently pending appeal.

(8) *State v. Michael Anthony Cooks*, 97-0999 (La. 09/09/98), 720 So.2d 637, *certiorari denied* 526 U.S. 1042, 119 S.Ct. 1342, 143 L.Ed.2d 505, *rehearing denied* 526 U.S. 1128, 119 S.Ct. 1789, 143 L.Ed.2d 816; Docket No. 173,208, First Judicial District Court.

Michael Anthony Cooks was indicted for and convicted of the first-degree murder of Joe Frazier.

The jury unanimously recommended the death penalty, finding as aggravating circumstances that the killing took place in the course of a robbery and that Cooks knowingly created a risk of death or great bodily harm to more than one person.

On January 20, 1995 Cooks, known as "Da Mad Monsta Crip," and at least five others invaded Frazier's home and forced him and two other victims to the floor. Frazier was shot fourteen times in the back with three different caliber bullets, including a .45 caliber. The other two victims were shot five or six times each, one losing an eye. Both were shot in the head and sustained some brain damage. At trial the surviving victims testified that Cooks was the leader and gave orders to the others to "kill this bitch." Cooks was carrying a .45 chrome automatic. As Cooks was leaving the house, Frazier was crawling across the floor. Cooks shot him in the back, put a new clip in his weapon and shot him some more. Cooks stole marijuana and cash from the house. Cooks' girlfriend called police and turned him in. While in prison Cooks wrote letters in "gang script" to the girlfriend threatening the lives of the surviving victims. He also threatened to kill the girlfriend and her sister after burning their genitals with a cigarette lighter.

During the penalty phase, Cooks' defense team presented testimony by Mark Vigen, a psychologist, that Cooks had a little lower than average IQ but was not borderline or retarded and that Cooks handled stress through violence. Cooks' sister testified that their mother's boyfriends had pushed him around.

His niece testified that Cooks had once taken her "trick or treating" and his thirteen year old son, whom he had rarely seen until he was nine, testified that he'd be sad if his father got the death penalty.

The State presented restricted evidence of an aggravated battery committed while incarcerated awaiting trial where Cooks had stabbed out the eye of another inmate. The State also presented limited testimony regarding another aggravated battery incident where Cooks and other gang members attacked a customer in a liquor store. As in the instant case, Cooks directed his companions to kill their victim. Cooks personally beat this victim with a newspaper rack and threatened to kill two liquor store attendants if they told police. It is hardly surprising that the jury, confronted with "Da Mad Monsta Crip's" violent tendencies, agreed unanimously to impose the death sentence.

(9) *State v. Percy Davis*, 92-1623, (La. 5/23/94), 637 So.2d 1012, *certiorari denied* 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359, *rehearing denied* 513 U.S. 1066, 115 S.Ct. 687, 130 L.Ed.2d 617; Docket No. 151,074, First Judicial District Court.

Percy Davis was indicted for two counts of first-degree murder committed two days apart. The counts were tried together and Davis was found guilty and sentenced to death on both counts. The jury found as to each count the aggravating circumstance that

Davis had been engaged in the perpetration of armed robbery. The case is now on post-conviction relief.

Mark Sanchez was a cashier at a Circle K convenience store on North Market Street in Shreveport. On June 29, 1990, he was working after midnight. Davis parked his car behind the Circle K and went in. He shot Mark Sanchez three times: twice in the abdomen and once right between the eyes. Davis then jumped onto the counter and opened the cash register, obtaining $30 to $40. Sanchez died the next day.

On July 1, 1990, Calvin Moore and his wife Norma were working at "Fats' Exxon," a convenience store in the North Market Street area which he and his wife owned. At midnight, Davis and Rodney Hill entered the store. Davis took a gun from his sock and shot Calvin Moore in the chest. He shot at Norma Moore as well. This time, a video surveillance camera recorded the murder. Local television stations broadcast part of the tape and Rodney Hill turned himself in to police that same night. Davis was arrested shortly thereafter. His gun, a .25 Raven automatic, was identified as the murder weapon in both killings as well as the attempted murder of Johnny Hall, the same night as Mark Sanchez was murdered. Hall was working as a cashier at Fats' Exxon at the time.

The jury found the presence of three aggravating circumstances for each of the murders of Mark Sanchez and Calvin Moore.

The jury found as to both murders that the murders were committed in the perpetration or attempted perpetration of armed robbery, and that the offender had been previously convicted of an unrelated armed robbery. This additional armed robbery occurred in Bossier City only a few days before the Shreveport murders, and testimony proved defendant's plea of guilty to that charge.

As to the murder of Mark Sanchez, the jury found as an additional aggravating circumstance that the murder was committed in an especially heinous, atrocious or cruel manner.

As to the murder of Calvin Moore, the jury found as an additional aggravating circumstance that the offender knowingly created a risk of death and great bodily harm to more than one person. During the armed robbery of Fats' Exxon, Percy Davis not only shot Calvin Moore, he also fired at Norma Moore, hitting a display case near where she was standing.

Defense counsel tried to present Davis as a victim of his cocaine addiction and argued intoxication in mitigation.

(10) *State v. Curtis Deal*, 00-0434 (La. 11/28/01), 802 So.2d 1254, *certiorari denied* 537 U.S. 828, 123 S.Ct. 124, 154 L.Ed.2d 42; Docket No. 184,852, First Judicial District Court.

Curtis R. Deal was convicted of the First Degree Murder of his eleven week old son, [Name Of Minor

Child Omitted]. The jury sentenced the defendant to death.

On the evening of November 16, 1996, Deal and his wife, the mother of his infant son, were entertaining a house guest at the home which they shared with the victim's grandmother. After much drinking of beer, Deal was up alone after everyone else went to sleep. In the early morning hours of November 17, 1996, the victim began crying. Deal became frustrated with the baby continuing to cry after he had fed the child. Deal stuffed a golf ball size piece of paper towel down the baby's throat and then fractured the baby's skull by throwing the child into the baby bed, causing the baby's head to strike the slats of the crib. The Fire Department responded to Deal's 911 call and found the baby dead. The towel was removed from the baby's throat, but fevered efforts at resuscitation were unsuccessful. Later that same afternoon Deal confessed to Shreveport Police Department detectives what he had done.

At the penalty phase Deal testified that he never meant to kill his son. The defendant also presented the evidence of Dr. Mark Vigen, a psychologist, who testified Deal was of average intelligence and the product of developmental circumstances and of biological vulnerability. Dr. Vigen said Deal was dependent on alcohol and drugs. Dr. Vigen also testified that he was told by family members that Deal had a terrible temper and as a child would often tease and behave cruelly toward his siblings. Dr. Vigen was also told that Deal had a history of cruelty to animals,

including squeezing the family dog's testicles and allowing the dog to attack penned chickens and terrify a pet caged rabbit. Dr. Vigen also found Deal likely to have chronic problems with anger and irritability which may be disruptive if not dangerous.

(11) *State v. John L. Donaldson*, 391 So.2d 1182 (La. 1980) (per curiam); Docket No. 110,214, First Judicial District Court.

John L. Donaldson was indicted by a Caddo Parish grand jury for the first degree murder of an elderly Shreveport woman on January 12, 1979. Donaldson was also indicted for the aggravated burglary of the victim's home. Following trial by jury Donaldson was found guilty as charged of first degree murder. The jury was unable to reach agreement on a sentence. Donaldson was then sentenced to life imprisonment pursuant to La.C.Cr.P. Article 905.8.

The facts surrounding Donaldson's conviction and sentence were as follows. Eighty years old at the time of her death, Mrs. Herrin sustained three fatal stab wounds in her back. When police arrived to investigate, they discovered that the murderer had taken numerous items from the home, including diamond rings taken from the fingers of Herrin and weapons from the home. Shortly thereafter Donaldson was stopped by Bossier City police on a traffic violation. Police officers discovered the items stolen from the Herrin residence and the murder weapon in his vehicle.

The prosecution argued as aggravating circumstances that the killing occurred during the commission of an aggravated burglary and that it was an especially cruel and heinous offense. In mitigation, the defense argued that Donaldson had no previous criminal history and that he had a wife and family. The defense also urged the jury not to return the death penalty since the prosecution's case was entirely circumstantial.

(12) *State v. Willie Douglas*, 37,721-KA, (La.App.2d Cir. 12/10/03), 862 So.2d 390, *writ denied* 2004-0153 (La. 5/7/04), 872 So.2d 1080; Docket No. 207,807, First Judicial District Court.

Willie Douglas was convicted of the first degree murder of his girlfriend's three year old daughter, [Name Of Minor Child Omitted]. The jury was unable to reach a unanimous verdict during the sentencing phase, so a life sentence was imposed.

Douglas was the live-in boyfriend of Gwen Remedies, who was about 6 months pregnant with his child. Gwen's friend Anita was letting Gwen and Willie stay with her. Anita and Gwen were moving that week to a new place where Willie was not going to be living. Anita left her two children with Willie while she and Gwen went to the new place to clean up. Gwen also left three year old [Name Of Minor Child Omitted] with Douglas.

Douglas later called 911, claiming [Name Of Minor Child Omitted] fell down the stairs on the way

to the pool, but gave differing versions of how it happened. In fact, as the coroner testified, [Name Of Minor Child Omitted] was shaken so hard that her brain began to separate from itself and the walls of the skull, causing a severe hematoma. Her injuries were not consistent with a fall down the stairs.

One side of the brain swelled so much it compressed the other down onto the brain stem, eventually stopping the signals necessary to make the heart beat and the lungs breathe. In addition [Name Of Minor Child Omitted]'s abdomen was compressed in a manner that left no external mark but to such a degree the coroner said he could feel her spine if he pressed down with his hand. This resulted in a laceration inside the liver as it was crushed against the spine. The child had "fingertip" bruises consistent with being held violently as well as a broken rib.

In addition at the hospital while [Name Of Minor Child Omitted] was in the pediatric intensive care unit, Douglas assaulted the investigating officer and told an LSU Medical Center police officer: "I should have kicked her ass. I run her and if I tell her to shut down the investigation, it stops." At the penalty phase, twenty or so church members, family members, etc. testified as to Douglas's character.

(13) *State v. Darrell Dewayne Draughn*, 05-1825, Louisiana Supreme Court; Docket No. 212,107, First Judicial District.

Darrell Draughn was convicted of the first degree murder of sixty-four year old Loretta White. The jury

found that the offense was committed during the course of an armed robbery, first degree robbery or simple robbery, and was committed in an especially heinous, atrocious and cruel manner. Draughn was sentenced to death.

Loretta White's body was discovered on the morning of April 10, 2000, by her son when he arrived to take her to work. Loretta White had been stabbed 51 times, mostly in her head, face and neck. Her hands and forearms had defensive wounds. One stab wound to her right shoulder severed the carotid artery, and was likely the fatal wound. At least two stab wounds to her abdomen were post-mortem, probably inflicted to determine if Loretta White was actually dead.

Mrs. White's purse, wallet and picture holder were in the hallway next to the kitchen where her body was found. Missing from the wallet was the small amount of cash she habitually carried, from $20 to $40, and her credit cards and checkbook.

Blood droplets located at the crime scene were later matched to Draughn's DNA, who had become a suspect after an anonymous tip. Upon his arrest, a large scar was observed on Draughn's right hand between the ring finger and the little finger. The ring finger was also "drawn up" as if it had been injured.

Draughn lived with his mother, a few houses down from the victim's home on the same block of East Boulevard Street. At the time of his arrest, some seven months after the instant offense, Draughn was

incarcerated for an unrelated homicide where he had been positively identified in a shooting. That second degree murder charge was dismissed after Draughn was sentenced to death for the instant offense. Evidence of the unrelated homicide was presented to the jury during the penalty phase of the trial. Draughn's case is currently pending appeal before this court.

(14) *State v. Cedric D. Edwards*, 97-1797 (La. 7/2/99), 750 So.2d 893, *certiorari denied* 528 U.S. 1026, 120 S.Ct. 542, 145 L.Ed.2d 421; Docket No. 177,994, First Judicial District Court.

Cedric Edwards was convicted of the first-degree murder of Victoria Catanese Kennedy and was sentenced to death.

Edwards and at least one unidentified man made an unauthorized entry into the home of Gerald and Victoria Kennedy. The men had entered after Gerald saw them and went into the house to get a gun. He yelled to his wife and daughter to run. Edwards shot Gerald, breaking his arm. Victoria fell as she ran and Edwards shot her twice in the back of the head. Their teenage daughter hid under a sofa and escaped injury.

The jury found as aggravating factors that the offender was engaged in the commission or attempted commission of armed robbery or aggravated burglary and that the offender knowingly created a risk of death or great bodily harm to more than one person.

(15) *State v. Wayne Robert Felde*, 422 So.2d 370 (La. 1982); *certiorari denied* 461 U.S. 918, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983); Docket No. 109,803, First Judicial District Court.

Wayne Robert Felde was indicted by a Caddo Parish grand jury for the first degree murder of Shreveport police officer Glen Tompkins and found guilty as charged. The same jury unanimously recommended a death sentence on the ground of one aggravating circumstance: the victim was a peace officer engaged in his lawful duties. La. C.Cr.P. Article 905.4(b).

On October 20, 1978, Wayne Robert Felde, an escapee from a Maryland penitentiary where he had been serving time for manslaughter and four counts of felonious assault, shot and killed a Shreveport police officer. Police had responded to a disturbance at a pizza restaurant where they arrested Felde. A pat-down search failed to disclose a pistol hidden in his trousers.

On the way to the Shreveport Police Department, Felde managed to withdraw the weapon from his trousers and fired into the back of the front seat where Officer Tompkins sat behind the wheel. Tompkins was shot in the back and died only minutes afterwards. The defense presented a complex insanity defense, alleging that be suffered from a post-traumatic stress syndrome as a result of combat in Viet Nam. Felde also alleged intoxication as part of his defense.

The sole aggravating circumstance urged by the prosecution was that the victim was a police officer engaged in his lawful duties at the time of the offense. Felde testified at the penalty phase and urged the jurors to return the death penalty. His counsel urged the jury to return the death penalty in keeping with his agreement with Felde that a verdict of "not guilty and not guilty by reason of insanity" was the only acceptable verdict.

The foregoing prosecution was tried in Rapides Parish, Louisiana, on a change of venue due to extensive pro-trial publicity. *State v. Felde,* 382 So.2d 1384 (La. 1980). *State v. Felde* was the first first-degree murder case since 1976 where Caddo Parish prosecutors obtained the death penalty.

Felde was executed on March 15, 1988.

(16) *State v. Mack E. Forbes,* 362 So.2d 1385 (La. 1978) (per curiam); No. 104,937, First Judicial District Court.

Mack E. Forbes was indicted by a Caddo Parish grand jury for the first degree murder of Delores Edwards. Forbes was tried before a jury in November, 1977, and found guilty as charged. After a sentencing hearing, the jury recommended that Forbes be sentenced to life imprisonment.

The evidence adduced during trial showed that Forbes confronted Edwards and her boyfriend, James Green, in front of the Brown Owl Bar in Shreveport,

Louisiana. As the victim and James Green turned to walk away from Forbes to avoid a confrontation, the defendant started shooting at Green. He shot four times with three bullets striking Green. Forbes then turned to Delores Edwards, knocked her to the ground, held the pistol up to her chest and shot her twice in the chest at close range.

The State argued that the defendant had created a risk of death to two or more persons and that the offense was committed in an especially cruel and heinous manner. The defense countered with the argument that the offense was essentially a crime of passion arising out of domestic violence, as Forbes had shot his former girlfriend who was accompanied by her new boyfriend. Although Forbes had served a great deal of time in prison as a result of several burglary convictions, the State was not permitted to argue Forbes' substantial criminal record because they were not crimes of violence. The defense thus was able to exploit Forbes' apparent absence of previous criminal conduct.

(17) *State v. Glenn Ford*, 489 So.2d 1250 (La. 1986), *writ granted and remanded* 479 U.S. 1077, 107 S.Ct. 1272, 94 L.Ed.2d 133, *on remand* 503 So.2d 1009 (La. 1987), *writ denied* 498 U.S. 992, 112 L.Ed.2d 547, 111 S.Ct. 537, *rehearing denied* 498 U.S. 1075, 111 S.Ct. 803, 112 L.Ed.2d 864; No. 126,005, First Judicial District Court.

Glenn Ford was indicted for the first-degree murder of Isadore Rozeman, an elderly jeweler. The

jury found Ford guilty as charged and imposed the death sentence. The jury found as an aggravating circumstance that the murder was committed in the perpetration of an armed robbery.

On November 5, 1983, Mr. Rozeman's body was found by a friend in his home watch repair shop. Mr. Rozeman had been shot once through the head. A duffle bag was used to cover Mr. Rozeman's head when he was shot. A brown paper bag had been used as a glove to fire the weapon, and revealed a partial print consistent with Ford's.

The shop display cases had been emptied, of jewelry and Mr. Rozeman's pockets turned out.

Neighbors placed Glenn Ford, Mr. Rozeman's yardman, in the area near the time Mr. Rozeman had spoken with the friend who later found his body, the last time Mr. Rozeman was known to be alive.

Pawnshop receipts showed Ford had pawned jewelry similar to that taken from Mr. Rozeman's shop immediately after the murder. Ford had purchased a gun the morning before the murder and tried to sell one later that afternoon. A gunshot residue test was positive. Ford told a cellmate that he and two other men robbed Mr. Bozeman and that he shot him. Ford presented an alibi defense.

(18) *State v. Russell Foy, Sr.*, 439 So.2d 433 (La. 1983); Docket No. 114,783, First Judicial District Court.

Foy was arrested and indicted by a Caddo Parish grand jury on two counts of first-degree murder. Foy was tried by a jury on April 26, 1982, and found guilty as charged. Following a sentence hearing the jury unanimously recommended that Foy be sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence.

On June 7, 1980, Carr Allen Corbin, his common-law wife, Betty Williams, and their two daughters were confronted by the defendant who directed Corbin to drive his automobile to a remote area in Caddo Parish. They were followed by an unidentified male in another car. There Russell Foy shot and killed Carr Corbin. Foy then left the Corbin vehicle and got into the other car. Shortly thereafter the automobile stalled as Ms. Williams tried to drive away and Foy's vehicle pulled up alongside her. Foy approached Ms. Williams and shot her three or more times. The two little girls were not harmed.

As an aggravating circumstance the prosecution argued that Foy knowingly created a risk of death or great bodily harm to more than one person. In mitigation, the defense urged the jurors to consider Foy's relatively young age, the absence of a prior significant criminal history, and that Foy was married.

(19) *State v. Roderick L. Gay*, 29,434 (La.App.2d Cir. 6/18/97), 697 So.2d 642; Docket No. 174,135-A, First Judicial District Court.

Roderick L. Gay was indicted for the first-degree murder of David L. Morris on March 24, 1995, and found guilty as charged. The jury was unable to agree on the penalty and Gay was therefore sentenced to life imprisonment.

David Morris was selling clothes out of the trunk of his car when Gay put a gun to the back of Morris's head and demanded "give me all your shit." When Morris turned, Gay shot him in the chest through the armpit. Gay then pressed the gun to Morris's side and fired again, severing his spinal column. Gay shot Morris yet again as he lay paralyzed in the street, with the shot entering Morris's temple. Morris's wife and daughter were present during the shooting.

After shooting Morris, Gay stole several armloads of clothing from the trunk of Morris's car. Witnesses identified Gay as the shooter. At trial Gay claimed he was intoxicated and that Morris was shot in a struggle over the gun that began because Gay thought that Marvin Young, a State's witness, was trying to "beat him" out of some money he gave Young for drugs.

At the penalty phase the State argued as the sole aggravating circumstance that the killing was committed in the course of an armed robbery. The defense presented testimony that Gay was intoxicated and a crack addict and Gay maintained that the shooting arose because of an argument over drug money.

(20) *State v. Demetric Gilliam*, 36,118 (La.App.2d Cir. 8/30/02), 827 So.2d 508, *writ denied* 2002-3090 (La. 11/14/05), 858 So.2d 422; Docket No. 209,258, First Judicial District Court.

Demetric Gilliam was convicted of the first degree murder of a three year old boy and sentenced to life imprisonment.

On August 18, 1998, Demetric Gilliam got together with his brother, Terance, and a friend, Larry White, and went looking for one Tyrell Odell. Mr. Odell had been giving Demetric trouble for several months, and the last straw was the robbery of a dice game a few days before where Demetric lost $4,500.00, part of some $10,000.00 supposedly stolen in the robbery.

When Gilliam saw Odell's car parked at the Hollywood Liquor Bank, he pulled up and stopped his car broadside, blocking Odell's car in. Odell, who had his former girlfriend, Teresa Bryant, her two children, and a friend, Eric Calhoun, in the car, reversed in an attempt to get away, colliding with the side of Gilliam's car as a result. Gilliam began to fire his .45 out of the window, part of the time firing blind as he ducked down the seat. Terance, with the assault rifle, and Larry White, with the shotgun, emerged from Gilliam's Grand Am and riddled Odell's car with gunfire, with some 25 bullets entering through every side of the vehicle. Every occupant of Odell's vehicle sustained gunshot wounds. The three year old victim, who had been shielded by Calhoun, jumped up when

Calhoun was shot and sustained a gunshot wound to the back of the head from the assault rifle. He was the sole fatality of the ambush.

Gilliam was arrested the next day as be cowered in the attic of a girlfriend's home, interrupted in his preparations to flee. Gilliam was indicted for first degree murder where there was a substantial risk of death or great bodily harm to more than one person. Gilliam was found guilty as charged and, the jury being unable to agree on a sentence, received life imprisonment without benefit of probation, parole or suspension of sentence. At the penalty phase, Gilliam's family members testified to his good character. Gilliam lacked any prior felony convictions.

(21) *State v. Bobby Ray Hall*, 388 So.2d 1164 (La. 1980) (per curiam); No. 110,856, First Judicial District Court.

Bobby Ray Hall was indicted by a Caddo Parish grand jury for the first degree murder of his wife, Ollie Mae Hall, in violation of La. R.S. 14:30. Hall was found guilty as charged by the jury. Following a sentencing hearing Hall was sentenced to life imprisonment at hard labor without benefit of probation, parole or suspension of sentence.

On March 24, 1978, Bobby Ray Hall got into an argument with his wife, Ollie Mae Hall. Shortly thereafter, Hall fired two shots at his wife, striking her in the arm and back. He was seen running from

the residence with a .12 gauge shotgun in his hand. In a recorded statement Hall admitted shooting his wife but claimed that he didn't mean to kill her.

The prosecution did not actively seek the death penalty in this case. The circumstances of the offense indicated that the killing arose out of a domestic disagreement and that Hall may have been under the influence of a mental or emotional disturbance at the time of the killing.

(22) *State v. Bobby Lee Hampton*, 98-0331 (La. 4/23/99), 750 So.2d 867, *certiorari denied* 528 U.S. 1007, 120 S.Ct. 504, 145 L.Ed.2d 390, *rehearing denied* 528 U.S. 1108, 120 S.Ct. 855, 145 L.Ed.2d 721 (2000); Docket No. 176,627, First Judicial District Court.

Bobby Lee Hampton was convicted of the first-degree murder of Russell Coleman during the course of an armed robbery and was sentenced to death.

On August 12, 1995, Hampton and two companions entered a Thrifty Liquor Store on Greenwood Road in Shreveport. Hampton shot Coleman three times in the back without warning. During the penalty phase, the jury learned of Hampton's prior convictions for aggravated battery and second-degree battery, attempted simple escape and attempted armed robbery. Evidence was also adduced regarding an unadjudicated armed robbery Hampton committed six days before the murder where the 27 year old Hampton pistol-whipped a Kroger grocery store

employee. Hampton's family members asked the jury to spare his life.

(23) *State v. Brandon Haynes*, 27,499 (La.App.2d Cir. 11/1/95), 662 So.2d 849, *writ denied* 95-2768 (La. 2/16/96), 667 So.2d 1050; Docket No. 166,637, First Judicial District Court.

Brandon Haynes was indicted for and convicted of the first-degree murder of Fang Yang. The jury was unable to agree on the penalty, so a sentence of life without benefit was imposed by the trial court.

Fang Yang was a 26 year old graduate student at LSU Medical School in Shreveport. On October 26, 1993, her body was found near the ten-story Bio-Medical Research Institute (BRI) building under construction at the medical school. She had been raped both anally and vaginally and cut and stabbed superficially before falling to her death from the roof of the ten-story building. Overnight surveillance film at the medical school showed construction worker Brandon Haynes reaching up to turn off the camera on the ninth floor of the medical school building which was connected to the BRI building. Fang Yang's wallet was found concealed in the wall of Haynes' home and human blood was present in his car. DNA testing confirmed that Haynes was the person who had raped Fang Yang. Blood was also found on the roof of the BRI building.

At trial Haynes' defense team admitted their client's guilt as to the kidnapping and rape of Fang

Yang, over their client's express objection. The defense concentrated on their claim that Fang Yang's fall was accidental, perhaps as she ran to try to escape Haynes. Haynes had no prior criminal convictions.

(24) *State v. Daniel Irish*, 00-2086, (La. 01/15/02), 807 So.2d 208, *certiorari denied* 537 U.S. 846, 123 S.Ct. 185, 154 L.Ed.2d 73; Docket No. 186,209, First Judicial District Court.

Danny Irish was convicted of the first degree murder of his landlord, contractor Russ Rowland, during the course of an armed robbery, and was sentenced to death.

Evidence at trial showed that Irish had discussed for several days a plan to rob and murder one of two local contractors, finally deciding on Rowland, to whom Irish owed back rent. Irish lured Rowland to his trailer on the promise of a rent check. When Rowland arrived, a co-defendant, who later pled guilty and testified against Irish at trial, shot Rowland in the stomach with a twelve-gauge sabot slug. Irish then shot Rowland in the head with a 30/30 as he begged for his life. Irish dragged the body into the trailer, but was unable to get his co-defendant to help him dispose of the body. He had planned to put the body in a sleeping bag and "sink" it in a near-by swampy area. Police arrived before he was able to carry out his plan.

At the penalty phase, Irish put on evidence that he had moved frequently as a child, and that his mother had been married five times. A defense expert diagnosed him as having an antisocial personality disorder.

(25) *State v. Edward W. Johnson, Jr.*, 27,522 (La.App.2d Cir. 12/6/95), 665 So.2d 1237; Docket No. 162,565, First Judicial District Court.

Edward Johnson, Jr., was convicted of the first-degree murder of Shreveport police officer Ron Dean during the execution of a drug search warrant on December 16, 1992. The jury sentenced him to life imprisonment.

Ron Dean was the first man on the entry team. He was wearing a black T-shirt with "POLICE" in big white letters across the front and back. He also wore a bullet-proof vest. The officers continuously announced their presence, yelling "Police, search warrant" and Dean attacked the door with a battering ram. Dean then kicked the door open. As he ran in, Johnson shot Dean twice. One bullet hit Dean in the left armpit, an area uncovered by the vest. Dean died due to severe hemorrhage as the bullet traveled through both lungs and his heart. Another bullet was found in the back of the vest. Another police officer was shot in the leg by Johnson, who sustained two or three minor gunshot wounds himself.

At trial, Johnson claimed that he did not hear the officers yelling and thought the officers were burglars, and was therefore acting in self-defense.

(26) *State v. Ray Jones, Jr.*, 386 So.2d 1363 (La. 1980); Docket No. 110,300, First Judicial District Court.

Ray Jones, Jr., was indicted by a Caddo Parish grand jury for the first-degree murder of his two and one-half month old son. After trial by jury, he was found guilty as charged. The same jury then recommended that Jones be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

On January 18, 1979, Ray Jones, Jr., smoked a PCP cigarette in the home of his common-law wife. After shaving his head and removing all of his clothing, he choked his common-law wife into unconsciousness while chanting the word "satan." He then beat his young son and threw his body into the back yard. He was arrested a few blocks away while scuffling with two white men working in a vacant house. Jones screamed that he had been sent by God to kill all white people. Jones was immediately transported to the psychiatric ward of the LSU Medical Center in Shreveport. Medication had an immediate beneficial effect on Jones, who then recounted to the hospital staff and Shreveport Police the circumstances leading up to, and including, the offense. Jones explained

that he killed the child because he felt the child was Satan.

The State did not seek the death penalty in this case because of the presence of the obvious mitigating circumstance that Jones was under the influence of his voluntary intoxication. The prosecution nevertheless did advise the jury that if they found that the offense had been committed in an especially heinous, atrocious, or cruel manner that the death penalty was an available option. In mitigation, Jones presented evidence from the two members of the Sanity Commission regarding the defendant's intoxication and the PCP level found in his urine sample.

(27) *State v. Michael Edward King*, 395 So.2d 1367 (La. 1981) (per curiam); Docket No. 109,890, First Judicial District Court.

Michael Edward King was indicted by a Caddo Parish grand jury for the first-degree murder of Audria Renee Kellum in violation of La. R.S. 14:30. Following a jury trial the defendant was found guilty as charged. Thereafter the jury recommended that he be sentenced to life imprisonment without benefit of parole, probation or suspension of sentence.

The evidence at trial revealed that Michael Edward King lived in a common-law relationship with Audria Renee Kellum and her two children. In November of 1978, King came home one night carrying a pistol. He argued with Audria until she called the police to have him ordered out of the house. King

was twice ordered to leave the premises but feigned doing so. Upon re-entering the home he packed a suitcase. While in the process of leaving King fired two or three shots at Audria while she was seated in a chair only a few feet from him. The fatal wound severed her jugular vein after entering her right cheek. The offense was committed in full view of the victim's mother and children, who were all in the same room.

The prosecution pointed out the existence of two aggravating circumstances during the penalty phase of the trial, to-wit: that the offender created a risk of death or great bodily harm to more than one person and that the offense was committed in an especially heinous, atrocious or cruel manner. The State did not, however, actively seek the death penalty in the case because the prosecution felt that such a penalty was not warranted, the murder having arisen out of a domestic confrontation. The jurors were merely advised that if one of those aggravating circumstances were found that they could recommend the death penalty as an option. In mitigation, the defense adopted the evidence adduced at the guilt phase which attempted to show that King was intoxicated at the time of the killing and was under the influence of a mental disturbance.

(28) *State v. James Allen Lee*, 395 So.2d 700 (La. 1981); No. 105,594, First Judicial District Court.

James Allen Lee was indicted by a Caddo Parish grand jury for the first-degree murder of Jerry Dennis committed on June 18, 1977. Defendant entered a dual plea of not guilty and not guilty by reason of insanity. Lee's jury rejected his defense, convicting him as charged. The jury then unanimously recommended that Lee be sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

On June 18, 1977, James Allen Lee went to the Shady Oaks Cafe, a neighborhood bar and restaurant. Jerry Dennis owned and operated the cafe on the night in question. Dennis and Lee were acquaintances. Initially Lee was at the cafe at approximately 12 p.m., complaining to Dennis and two of the patrons that someone had taken his car keys. A patron told Lee to leave the cafe as no one there had his keys.

Lee returned to his house and retrieved a shotgun. Lee returned to the cafe and shot Jerry Dennis in the throat and chest, killing him.

Lee's trial was extraordinary. He was a self-proclaimed born-again Christian and religious zealot. He repeatedly and vigorously recited scripture to all who would listen for the duration of the trial. Lee also was a huge physical specimen; his muscular build was like that of a professional weight lifter. On more

than one occasion Lee was handcuffed and shackled. He repeatedly interrupted the trial with outlandish and sometimes violent behavior. His conduct ranged from the singing of the National Anthem before the jury to a physical confrontation with six large deputy sheriffs. He often interrupted argument and testimony with loud recitations of scripture.

The death penalty was not sought by the prosecution in this case for obvious reasons. However, the jury was made aware that the death penalty was a viable option, though no one encouraged the jury to return the same.

(29) *State v. Nick Nicholson*, 437 So.2d 849 (La. 1983); Docket No. 119,116, First Judicial District Court.

Nick Nicholson was indicted by a Caddo Parish grand jury for the first-degree murder of Kelly Ann Gramm in violation of La. R.S. 14:30. Nicholson was found guilty as charged by unanimous verdict. The same jury was unable to unanimously agree on the penalty. The trial court subsequently sentenced Nicholson to spend the remainder of his life in prison at hard labor without benefit of probation, parole, or suspension of sentence.

The evidence at trial showed that Kelly Ann Gramm, the only night attendant at a Citgo Quick Mart, was attacked by Nicholson with a pocket knife at approximately 2 a.m. The victim sustained 39 stab wounds over her head and body. A piece of the knife

blade was found lodged in her head. Having brutally murdered his victim, Nicholson grabbed the cash register and ran to his automobile to make his escape. He was quickly apprehended by a police officer who was responding to a silent alarm at the Citgo Quick Mart and saw Nicholson's vehicle leaving the parking lot. The register was on the front seat of Nicholson's car.

The State sought the death penalty on the basis of two aggravating circumstances, to-wit: that the murder was committed during the course of an armed robbery and that it was accomplished in an especially cruel and heinous manner. The defense urged several arguments in mitigation, including Nicholson's youth (18 years of age) and that he had no significant prior criminal history. The defense also put on numerous character witnesses in the penalty hearing, urging the jury to spare Nicholson's life.

(30) *State v. Cecil Odom*, 33,340, (La.App.2d Cir. 5/10/00), 760 So.2d 576, *writ denied* 2000-1816 (La. 6/29/01) 794 So.2d 821; Docket No. 189,353, First Judicial District Court.

Cecil Odom was found guilty as charged of two counts of First Degree Murder. The jury was unable to agree on the penalty so the defendant received the mandatory life sentence for both counts. Odom stabbed his wife but she survived. He stabbed and killed his adopted teenaged daughter and her

natural grandmother. Evidence showed Odom was obsessed with the girl and angry at her contempt for him. Odom had entered a plea of not guilty and not guilty by reason of insanity. The defendant had previously been diagnosed with a mental illness and had a family history of mental illness.

The defense adduced much evidence at the guilt phase about Odom's mental illness and his family history. At the penalty phase of the trial the defense put on evidence about his horrible childhood and his father's physical abuse of Odom and sexual abuse of Odom's sister. The defendant claimed he had also been sexually abused by his uncle and one other relative.

(31) *State v. Bobby Ray Reed*, 448 So.2d 794 (La.App. 2d Cir. 1984), *writ denied* 452 So.2d 696 (La. 1984); Docket No. 120,263, First Judicial District Court.

Bobby Ray Reed was indicted by a Caddo Parish grand jury for the first-degree murder of Tempie Ann Jones. At the penalty phase of the trial the jury could not unanimously agree on the imposition of the death penalty. Reed therefore was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

On the evening of January 15, 1982, Reed went to the victim's home where they argued over money. Reed beat the victim with his fists, cut her with a knife and pistol-whipped her. He forced her into the

trunk of her automobile and drove to a service station where he purchased twenty-five cents worth of gasoline and placed it in a plastic bottle. Reed then drove his victim to a secluded area, poured gasoline into the trunk and set the trunk ablaze. Tempie Ann Jones died two weeks later of the burns she received.

The State argued, as aggravating circumstances, that Reed was engaged in the perpetration of an aggravated arson, that the offense was committed in an especially heinous, atrocious, or cruel manner, and that Reed had a substantial criminal history. In mitigation, the defense argued that Reed was intoxicated at the time of the offense and could not formulate the requisite specific intent to kill. In addition, the victim's mother testified at the penalty hearing that she preferred life imprisonment for Reed over the death penalty.

(32) *State v. Myron Osha Smith*, 31,955 (La.App.2d Cir. 5/5/99), 740 So.2d 675, *writ denied* 2000-1404 (La. 2/16/01), 785 So.2d 840; Docket No. 178,758, First Judicial District Court.

Myron Osha Smith was indicted for the first-degree murder of fourteen year old Andre Brooks. He was found guilty as charged and the jury agreed on a life sentence.

On November 4, 1995, Brooks was in a friend's home when Smith shot fourteen bullets through the house where seven children cowered in fear. The

shooting was apparently in retaliation for an earlier drive-by.

During the penalty phase Smith's mother begged for her son's life, bringing some jurors to tears.

(33) *State v. Calvin Tolbert*, 30,821 (La.App.2d Cir. 8/19/98), 716 So.2d 949, *writ denied* 98-2562 (La. 1/15/99), 736 So.2d 207; Docket No. 171,362, First Judicial District Court.

Calvin Tolbert was convicted of the first-degree murder of Wilma Liberto. The jury was unable to agree on a sentence and so Tolbert was sentenced to life imprisonment without probation, parole or suspension of sentence.

On August 1, 1994, Tolbert and two companions entered Liberto's Grocery in the Allendale area of Shreveport while two more companions waited outside. Mrs. Liberto, then 77 years old, and her son Paul ran the grocery. Tolbert stood in line and when he got to the counter he shot Mrs. Liberto and Paul Liberto once each. Tolbert never said a word, and the victims only knew there was a robbery happening when the shots were fired. Mrs. Liberto was killed. Paul Liberto was rendered a paraplegic, and died less than one year after the trial.

During the penalty phase, the State presented evidence that the 17 year old Tolbert had a juvenile adjudication for illegal discharge of a weapon and that he had a bad discipline record at Caddo

Correctional Center since his incarceration. The defense presented Dr. Mark Vigen, who testified that Tolbert was of "borderline" intelligence. Tolbert's family pleaded for mercy.

(34) *Slate v. Nolan Turner*, 37162, (La.App.2d Cir. 10/29/03) 859 So.2d 911, *writ denied* 2003-3400 (La. 3/26/04) 871 So.2d 347; Docket No. 203,173, First Judicial District Court.

Nolan Turner was convicted of First Degree Murder for the robbery and killing of Doyle Wayne Winn at the Jewella Tire Shop. The jury unanimously imposed a life sentence.

The Winn family owned and managed the tire business where the shooting took place. Turner along with co-defendant Jimmy Charles Coleman entered the building around 5 p.m. on July 8, 1999. Doyle Winn along with his sons Heath and Garrett Winn and a child from the neighborhood were in the office area of the shop. Turner pointed a gun at the victims and demanded that they go to the back of the store. The three boys complied and got on the floor in the back of the shop. A scuffle ensued between Doyle Winn and Turner. Doyle Winn called to Heath for help so Turner shot Heath twice, paralyzing him permanently. Doyle Winn was also shot twice and died from his injuries.

At the guilt phase, the State introduced the testimony of Heath and Garrett Winn. Heath had

chosen Turner from a photo line-up following the shooting and again identified him before the jury. An employee of the church across the street testified that she was waiting to pull onto Jewella when she heard shots and saw the robbers exiting the store. She followed the man matching Turner's description and saw him with a gun. She too chose Turner from a six-person photo line-up following the shooting. Turner gave an alibi that was later refuted.

At the penalty phase, the State called Heath and Garrett Winn and Doyle Winn's fiancée Helen Lucking as victim impact witnesses. By stipulation between the State and defense, the defendant's prior convictions of possession of cocaine and illegal possession of stolen things were introduced to the jury.

General evidence of good character was introduced by the defense through various friends and family members, including Turner's father who is incarcerated in Huntsville, Texas. Evidence of his relationship with his young son in Baton Rouge was also introduced.

(35) *State v. James Tyler, III*, 97-0338 (La. 9/9/98), 723 So.2d 939, *certiorari denied* 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556, *rehearing denied* 526 U.S. 1166, 119 S.Ct. 2066, 144 L.Ed.2d 230; Docket No. 175,282, First Judicial District Court.

James Tyler, III, was indicted for first-degree murder in the death of Jock Efferson. Tyler was found

guilty and sentenced to death. The jury found as aggravating circumstances that Tyler was engaged in the perpetration of a robbery and that he knowingly created a risk of death or great bodily harm to more than one person.

On May 29, 1995, at around 9:30 p.m., Jock Efferson, Denise Washington and Rahsaan Roberson were working in a Pizza Hut on Greenwood Road in Shreveport, Caddo Parish, when James Tyler, III, walked up to the drive-through window and began talking to Efferson about buying a pizza. He walked off and several minutes later entered the restaurant through the rear entrance used by employees. Tyler had a handgun in one hand and a ski mask in the other. He ordered Efferson to open the cash register, which he did. Tyler then ordered the three employees to the cooler, ordered them to lie on the floor and shot them each in the head. Washington and Roberson remained conscious and when they thought Tyler was gone they got up and locked the back door. Washington's boyfriend arrived and rendered assistance to them. Efferson died of his wounds the next day.

The evening of May 30, 1995, Sharlot Tedder, a prostitute who had acted as a confidential informant in the past, related to police that she had stayed with a black male calling himself Marcus "Cricket" Tomlin at the Palomar Hotel across the street from the Pizza Hut. On the 29th, he left at around 9:30 saying he had to "do" something and returned about a half hour later nervous and sweating. She knew him to possess

a .22 caliber revolver. Tedder saw emergency vehicles at the Pizza Hut about 10 p.m., and asked "Tomlin" if he "did that across the street." He replied "yes," and offered to tell her about it, but she declined. "Tomlin" now had a large wad of money and bought a large amount of cocaine. "Tomlin" later confided a number of details of the robbery to her. He seesawed between remorse, saying God wouldn't forgive him for what he had done, and disbelief that two of the victims were in fair condition after being shot in the head. Upon learning of Efferson's death from the television news, he remarked "one down, two to go." He then told Tedder to come back into the room with him, saying he'd already "got three . . . what's one more?" Tedder became fearful for her life after he confided this, called police and participated in setting up his arrest. Upon his arrest, it was determined that Tomlin, in fact, was James Tyler, III.

At the penalty phase, defense counsel presented a number of psychiatric experts who testified as to Tyler's disturbed mental condition going back to his troubled childhood. The State presented Elvis Hopson, the manager of a fast food restaurant in St. Louis, Missouri, who had been shot by Tyler, his employee, during a robbery Christmas Eve, 1994. Tyler had not yet been arrested for this robbery and attempted murder before the murder of Jock Efferson.

(36) *State v. Ricky Washington*, 407 So.2d 1138 (La. 1981); Docket No. 110,490, First Judicial District Court.

Ricky Washington was indicted by a Caddo Parish grand jury for the first-degree murder of Grady Haynes in violation of La. R.S. 14:30. The jury returned a verdict of guilty of first degree murder. After deliberation, the jury was unable to unanimously agree upon a sentence recommendation. The trial court thereupon sentenced Washington to life imprisonment pursuant to La. C.Cr.P. Article 905.8.

The evidence at trial showed that on February 1, 1979, Grady Haynes, the owner and live-in manager of a grocery store, was shot to death behind the counter of his store. He was shot once in the back of the head with a .32 caliber handgun. The defendant's fingerprint was found at the scene. The cash register drawer was open. Washington gave two exculpatory, yet conflicting, statements to authorities, blaming different individuals for the death of Haynes. A search conducted at Washington's home produced the murder weapon.

The sole aggravating circumstance urged by the State was that the murder was accomplished during the course of an armed robbery. The defense proffered substantial arguments in mitigation, including the offender's youth (Washington was 18 years old), the absence of a prior criminal history, that others were involved (presumably he was less culpable), and Washington's diminished mental capacity.

(37) *State v. Thadius Webb*, 32607 (La.App.2d Cir. 1/26/00), 750 So.2d 479, *writ denied* 2000-0593 (La. 12/08/00), 775 So.2d 1078; Docket Number 184,452, First Judicial District Court.

Thadius Webb was convicted of the first-degree murder of Carl Ivey during the course of an armed robbery. After penalty phase, the jury unanimously agreed to a life sentence.

Carl Ivey met the defendants at the Pinstripe Lounge and agreed to give them a ride to Amos Desadier's house in Cedar Grove. When they arrived in the alley behind Desadier's home, Webb and co-defendant David Thompson attacked Ivey. Thompson was the ring leader and the evidence showed that he stabbed and beat Ivey while Webb held him down. Ivey's body was put in the backseat of his car and driven by Thompson to Wallace Lake Road. Webb helped dump the body in the woods. Torture wounds were identified on Ivey's legs by the coroner. Three fishing poles were taken from the car by Thompson. The evidence showed Thompson to be the actual killer and Webb to be only a principal. In addition, Webb did not have a criminal record of any kind.

(38) *State v. Corey D. Williams*, 2001-1650, (La. 11/01/02), 831 So.2d 835, *writs denied* 2005-1556 (La. 2/17/06), 921 So.2d 105; Docket No. 193,258, First Judicial District Court.

Corey Williams was convicted of the first degree murder of Jarvis Griffen, a young pizza delivery

driver, during the course of an armed robbery, and was sentenced to death on October 28, 2000. On the night of January 12, 1998, life-long friends Corey Williams and Gabriel Logan met up at Renee Iverson's residence at [Home Address Omitted] in Shreveport, Caddo Parish, La. Renee had several friends over at her house when the group decided to order from Pizza Hut.

There were six people in the house when Jarvis Griffen, a 26 year old long time employee of Pizza Hut, delivered the pizza. Gabriel Logan exited the house as Griffen was standing in the doorway collecting money for the pizza. Logan walked outside and talked to Corey Williams who was standing in front of the house. During their discussion Logan handed Corey Williams a pistol. Corey Williams then approached Jarvis Griffen as he reentered his vehicle. Williams fired several shots at the victim at point blank range with his arms outstretched clutching the pistol with both hands. Jarvis Griffen died of a gunshot wound to the chest which caused massive damage to both lungs, the arteries and the heart.

Gabriel Logan then ran to the victim's vehicle after it crashed into a house a short distance away. Logan entered the vehicle, pulled Griffen's body out onto the ground, rifled his pockets, reentered the vehicle, tried unsuccessfully to steal the car and finally exited with the money bag and a pizza. Williams fled the scene with the murder weapon immediately after the shooting.

In his statement, Williams said that he told the victim prior to shooting him to "give me the money." When the victim moved Williams shot him because "I wasn't fixin' to get killed."

At the penalty phase, the State introduced evidence of Williams' juvenile felony convictions for illegal use of a weapon and attempted simple robbery. Victim impact evidence was limited to the testimony of Griffen's uncle.

The jury also learned of Williams' extensive disciplinary records at both Caddo Correctional Center pending trial and during his juvenile incarceration. These included threats and violence directed against correctional officers as well as other inmates and an escape from juvenile detention. Defense expert Mark Vigen, PhD, opined that Williams had an antisocial personality disorder, was dangerous and could kill again.

On appeal, the Supreme Court affirmed the conviction and remanded for a hearing to determine if Williams is mentally retarded, under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Williams was found by the trial court judge to be retarded. Williams' death sentence was vacated and he was sentenced to life imprisonment.

(39) *State v. James K. Williamson*, 27,871 (La.App.2d Cir. 04/03/96), 671 So.2d 1208, *writ denied* 96-1143 (La. 10/04/96), 679 So.2d 1380. *On retrial* 35,122 (La.App.2dCir. 01/23/02), 805 So.2d 1235, *writ denied* 2002-0707 (La. 02/07/03), 836 So.2d 94; Docket No. 164,901, First Judicial District Court.

On June 19, 1993, James K. Williamson, entered the Soap Opera Washateria on Pines Road in Shreveport, Louisiana, and attempted to abduct Vickie Ferguson (later Perkins), his former girlfriend. Estal Thompson and his sons, Michael and Scott, intervened and all three were shot by defendant. Estal died at the scene while his sons, though seriously injured, survived. Williamson forced Vickie into his car and drove off with her. When his car broke down he forced Vickie down into a drainage ditch and began choking her. An armed motorist pointed his gun at Williamson and threatened to shoot him if he did not stop. Williamson fled into the woods and was arrested the next day.

Prior to his trial in 1995 Williamson filed a motion to dismiss his appointed counsel and sought to try the case himself. The trial court denied the motion. The jury found Williamson guilty of first degree murder and sentenced him to life imprisonment. Williamson's conviction and sentence were affirmed on appeal, but Williamson won a new trial through a federal writ of habeas corpus on his claim that he should have been allowed to represent himself at

trial. Williamson was re-tried, this time for second degree murder, and was found guilty as charged.

(40) *State of Louisiana v. Aaron Christopher Wilson, State v. Wilson, remanded* 2003-1229, (La. 3/30/05), 899 So.2d 551; *affirmed* 40,767, (La.App.2dCir. 8/23/06), 938 So.2d 1111; Docket No. 213,012 First Judicial District Court.

Aaron Wilson was convicted of First Degree murder and sentenced to death for the kidnapping, robbery, rape and murder of Vicki Lynn McGraw. At approximately 9 p.m. on December 23, 2000, Wilson along with three friends (Leon Bagley, Torius Scroggins & Derrick Bouya) were riding about Shreveport looking for a person to carjack and rob. They pulled behind a white Chevy Blazer SUV and saw that only one person was in the vehicle. They followed the SUV driven by Mrs. McGraw into the Southern Oaks apartment complex on 70th Street. When she stepped out of her car, Wilson, armed with a .380 semi-automatic handgun, and co-defendant Derrick Bouya, armed with an assault rifle, forced her back into her vehicle at gunpoint. Mrs. McGraw drove them to a local ATM where she was forced to withdraw money from her account and give it to one or both of the men. Bouya then got in the driver's seat and drove the SUV south of town for approximately twenty miles. Wilson was in the backseat with Mrs. McGraw.

During the ride, Wilson forced her to disrobe and raped her orally, vaginally, and anally. She defecated

on the backseat of the vehicle. When Mrs. McGraw asked to use the restroom, Bouya pulled the car onto the side of the rode. While Mrs. McGraw was squatting down next to the truck defecating, Wilson shot her in the top of the head. The two men drove away leaving her body on the side of the road where it was discovered the next morning by a resident looking for her lost dog. Mrs. McGraw's truck and cellular phone were recovered several days later after being used by the various persons involved. In addition, her credit cards were used to purchase clothing, jewelry and other items at local malls.

At the jury trial, the State introduced the taped confession of the defendant given at the time of his arrest. In the statement, he admitted to the vaginal and oral rape of Mrs. McGraw as well as to being the shooter. DNA expert Connie Brown of the North Louisiana Crime Lab testified that Wilson's DNA was found on the vaginal swab taken during the autopsy. The former deputy coroner and a forensic pathologist, Dr. Stephen Cogswell, testified that there was damage to Mrs. McGraw's anus that was indicative of forced penetration.

The defense called the defendant to testify on his own behalf. Although he again admitted to the oral and vaginal rape of Mrs. McGraw, he denied his role as the shooter. He testified that he lied to the police because he was scared of Derrick Bouya. Wilson told the jury that Bouya was the actual shooter. In addition, Wilson's father and aunt testified regarding

Wilson's relationship with his mother who suffered from multiple sclerosis.

At the penalty phase, the State presented the testimony of co-defendant Derrick Bouya. A plea agreement between Bouya and the State guaranteed him a plea to second degree murder and a life sentence if he gave useful and truthful testimony at the Wilson trial. Bouya testified consistent with the statement he gave police following his arrest. He admitted to his role in the robbery and carjacking of Mrs. McGraw. He also admitted that he received clothes and jewelry charged on her credit card, used her cell phone and drove her vehicle after her murder. As he stated previously to police, he testified that Wilson was the shooter of the fatal bullet. In addition, the State called Wanda Simpson and James Stroud, siblings of the victim for victim impact evidence.

The defense called several family and friends of the defendant to testify that he was polite, respectful and a generally good person who had gotten involved with the wrong crowd and drinking. However, facts of the defendant's expulsion from high school and subsequent enrollment in an alternative school were elicited from these witnesses by the state. The cause of the expulsion was not admissible and not presented to the jury. In addition, the defendant's wheelchair-bound mother asked the jury to spare her son's life. Finally, the defendant again took the stand and recounted the story he had told the jury during the guilt phase of the trial. He continued to deny

responsibility for the death of Mrs. McGraw by blaming Bouya for the shooting.

During its rebuttal case, the State called witnesses to impeach the testimony given by the defendant regarding a prior conviction. The defendant's statement to the arresting officer was inconsistent with the story he presented the jury about the incident. The jury returned a penalty of death, finding as the sole aggravating circumstance that the defendant committed the killing in the course of a robbery, rape and kidnapping.

Wilson's appeal was stayed, pending the outcome of *Roper v. Simmons*, 540 U.S. 1160, 124 S.Ct. 1171, 157 L.Ed.2d 1204 (2004), regarding the constitutionality of the imposition of the death penalty on murderers who were under the age of eighteen at the time of the offense. Pursuant to *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), Wilson's death sentence was vacated, and he was sentenced to life imprisonment.

(41) *State v. Brandy Holmes*, 2006-KA-2988 Louisiana Supreme Court; Docket # 226,819, First Judicial District Court

Brandy Holmes and Robert Coleman were indicted for the first degree murder of Rev. Julian Brandon and the attempted first degree murder of his wife, Alice Brandon, as well as the first degree murder of Terrance Blaze. Holmes went to trial on the first degree murder of Rev. Brandon on February

6, 2006, in Caddo District Court and was convicted and sentenced to death.

Holmes and Coleman entered the Brandon home in rural Caddo Parish during the evening hours of New Year's Day 2003. After pushing their way into the front door of the Brandon residence, Julian Brandon, a retired Baptist preacher, was shot at near contact range under the chin with a .380 caliber handgun. The projectile separated into two pieces. One piece entered his brain, while the other piece exited the top of his head and was later recovered from the ceiling of the dining room adjacent to the front entryway. Julian Brandon collapsed.

Mrs. Alice Brandon was taken to the rear bedroom and made to lie down. Alice Brandon was interrogated about her valuables and begged for her life. A pillow was placed over Mrs. Brandon's face, and she was shot in the head and left for dead. The attention of the intruders was again focused on Rev. Brandon as they observed him struggling with his wounds, and they attacked Rev. Brandon a second time. At least three separate Chicago Cutlery style knives from the Brandon's kitchen were used in this second attack. Rev. Brandon received slashing cuts to his nose and face in addition to stabbing wounds on the top and rear of his head. The attack to the rear of Rev. Brandon's head was delivered with such force that one of the knives shattered; that knife was found in pieces at the scene. The offenders cut his throat by multiple starting/stopping incisions starting from the front right, across the front of his neck and around to

the back of his head. Rev. Brandon was repeatedly stabbed in the upper chest with wounds penetrating up to 6 inches, and was also stabbed in the back where a six-inch knife was found imbedded up to the handle. Rev. Brandon also had a large contusion from blunt force trauma on his forehead.

Several days passed before the Brandons were discovered. A family friend, who missed the Brandons from regular phone contacts and attendance at morning and evening Sunday services went to the home and found the couple on January 5, 2003. Mrs. Brandon was still alive and was transported by helicopter to the hospital. Mrs. Brandon continues to live in a severely impaired state as a result of the gunshot wound to the head.

After the discovery of the crime scene, the Caddo Sheriff's Office investigation gained momentum with a call from persons at a nearby apartment complex. It was learned that shortly after New Year's Day Brandy Holmes was in a nearby apartment complex trying to sell jewelry and making statements about killing an old couple down the road by a church. Detectives went to the Holmes' trailer, which was just around the corner from the homicide scene, and contacted Holmes, Coleman and other family members. The group agreed to go to the detective office for interviews. Coleman denied involvement but displayed cuts on his right hand. Holmes made several statements over the course of the next two days that implicated her and others as being involved in the homicide.

Holmes made at least six separate statements to authorities that related to the Brandon homicide. In most of these statements, Holmes implicated herself and others to varying degrees. Of the four interviews that were taped, Holmes destroyed the one in which she unequivocally admitted her role as the shooter and active participant in all the events concerning both Rev. Brandon and Mrs. Brandon. Holmes destroyed this tape by sneaking it into the ladies' room and flushing the magnetic tape down the toilet. Investigators also noticed that after Holmes' bathroom visit, she was no longer wearing some of the jewelry they had observed earlier.

In all but her first interview with detectives, Holmes described various details of the homicide with great precision. She admitted that she had stolen her father's .380 handgun while visiting him in Mississippi. She repeatedly acknowledged her presence and involvement in the attack on the Brandons, and on numerous occasions acknowledged her willingness to kill both Reverend and Mrs. Brandon. During her taped statements to Caddo deputies, Brandy Holmes admitted to bleaching her boots and burning her jacket stained with blood from Reverend Brandon's neck wound.

During her contact with investigators Holmes further revealed that on January 4, 2003, she took two of her nephews to view the bodies of Rev. Brandon and Mrs. Brandon. Her younger nephew later corroborated Holmes' account of this visit to the scene of the murder. The older nephew did not enter the

residence, but Holmes' nine-year-old nephew went in with his aunt and saw Rev. Brandon lying in a pool of blood, and also heard Mrs. Brandon screaming from another room in the house. Holmes and her nephews were seen going to the Brandon residence together. The same witness observed the nephews hurriedly leaving the Brandon residence without their aunt.

The investigation revealed and the evidence showed a close link between Holmes and Coleman. Holmes and Coleman traveled from Mississippi, where they lived together as girlfriend and boyfriend, to Shreveport on Christmas Eve 2002. They were picked up by Holmes' mother and resided in her trailer while the couple was in Shreveport. They brought with them the .380 caliber handgun that belonged to Holmes' father. That handgun was determined to be the murder weapon both by Holmes' admission and by ballistics comparison of projectiles and shell casings.

The items that were known to have been stolen from the Brandon residence included jewelry, particularly a multi-colored bracelet, and bankcards. There was an attempt to use one of the Brandon's bankcards where an incorrect PIN was used at an ATM in a nearby convenience store. In addition, Holmes and Coleman were recorded minutes later and just up the street on a Hibernia bank surveillance video trying to use a bankcard, again with the incorrect PIN number.

Many incriminating items were recovered from the Holmes' trailer where the two murderers had

stayed. Among those items was a clear plastic food service glove found in the rain gutter of the trailer that contained a multi-colored bracelet and a pearl bracelet. Rev. Brandon's daughter identified the multi-colored bracelet as the bracelet she had given her mother some time earlier. A box of these food service gloves was recovered from the bedroom shared by Coleman and Holmes. The food service gloves had a diamond pattern consistent with patterns in blood transfer stains observed at the Brandon residence. Additionally, a pillow was found in the Holmes' bedroom with a bullet hole through it. That pillow was not the one used to cover Ms. Brandon's face when she was shot, but was apparently a "practice" pillow.

In the same rain gutter that contained the multi-colored bracelet, three fired .380 cartridge casings were found. Investigators went to Holmes' father's residence in Mississippi. There her father took detectives to a location where he had fired the .380 handgun that was discovered missing at the time of Coleman and Holmes' departure from Mississippi. One of the cartridge casings found in the gutter was matched to a .380 cartridge casing recovered from that location in Mississippi. During analysis at the crime lab, Rev. Brandon's DNA was found on swabs taken from the fired cartridge casings found in the gutter. The portions of the .380 projectile that were recovered from Rev. Brandon's brain and dining room ceiling were matched to a projectile recovered from a tree pointed out by Holmes' father at the same location in

Mississippi where investigators had recovered the cartridge casing.

Victim impact testimony from family members was introduced at penalty phase. That testimony consisted of two family members testifying about the impact of this crime upon the Brandon family, and specifically upon Alice Brandon.

Evidence of the unadjudicated attempted murder of Mrs. Patricia Camp and the unadjudicated homicide of Terrance Blaze were also admitted. On December 27, 2002, Holmes made a 911 call from her mother's house in reference to a gated community located very close to her mother's trailer known as "Knob Hill." The call was an attempt to gain an access code for the gate at the front of that community. No access code was given to Holmes during that call; however, Holmes was able to get into the neighborhood. Later that same day, Holmes attempted to get into the residence of Mrs. Patricia Camp by ringing the doorbell and asking to use the phone. Mrs. Camp spoke with Holmes, but denied her entry to her house. Mrs. Camp saw Holmes again two days later, again while Holmes was trying to gain entry to her residence. Mrs. Camp did not let Holmes in on this subsequent attempt either. Holmes admitted in a statement to authorities that "If she would have opened that door, she would have been like Mr. Brandon" and "My plan was to get somebody on the hill that night."

Evidence of the Terrance Blaze homicide came into play when, as part of the Brandon investigation, Holmes directed authorities to Blaze's body. High velocity blood spatter and other bloodstains were found in Holmes' mother's vehicle and on Robert Coleman's pants. The significance of those stains was that Terrance Blaze was shot and bled in Holmes' mother's vehicle and that Robert Coleman was likely the driver. Expert testimony established that Blaze was most likely shot from the rear seat of the vehicle, not the driver seat. Holmes confessed in a letter to a prosecutor that she killed Terrance Blaze. Blaze was shot in the back of the head with a .380 caliber weapon and the bullet was recovered from his skull. A cartridge casing found near the location Blaze's body was dumped was matched to the cartridge case found in Mississippi.

Robert Coleman was convicted in a separate trial and sentenced to death as well. His case is pending appeal.

ARGUMENT

Article 905.9 of the Louisiana Code of Criminal Procedure requires this Honorable Court to review Brandy Aileen Holmes' sentence of death to determine whether or not it is unconstitutionally excessive. This query is guided by Louisiana Supreme Court Rule 28, Rule 905.9.1, § 1, which provides for capital sentence review as follows:

> Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

This is accomplished by considering both the defendant and the offense he committed. *State v. Celestine*, 443 So.2d 1091 (La. 1983), *certiorari denied* 469 U.S. 873, 105 S.Ct. 224, 83 L.Ed.2d 154 (1984).

Section 1(a)

A death sentence imposed under the influence of passion, prejudice or any other arbitrary factors is constitutionally excessive and must be vacated. The State submits that a review of the record fails to disclose the presence of any arbitrary factor which would have prejudiced appellant. The State submits that there is no error which created a substantial risk that Coleman's death sentence was imposed in an unjust manner.

There was no indication that the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. The defendant and her victim were of the same race and the record reflects no racial prejudice as a factor in the trial.

Section 1(c)

The final question before this Court is whether the sentence in this case is disproportionate to the penalty imposed, considering both the crime and the defendant.

Article I, § 20 of the Louisiana Constitution and Louisiana Supreme Court Rule 28 require a comparative proportionality review to determine whether the sentence herein is disproportionate to the penalty imposed in similar cases within the same parish. The review requires a comparison of both the crime and the defendant.

The State's sentence review memorandum lists 41 first-degree murder convictions in the First Judicial District (Caddo Parish) in which sentence was imposed after January 1, 1976. The death penalty was imposed in sixteen of these cases.[1]

In *State v. Edwards, supra*, at 914, this Honorable Court reviewed First Judicial District Court death penalty cases involving murders committed during the perpetration of an armed robbery, as well as numerous other armed robbery death penalty cases on a statewide basis, noting that "this Court has consistently affirmed death penalties in cases involving killing during armed robberies."

More recently, the Court noted "on a statewide basis, cases are legion in which this Court has affirmed capital sentences based primarily on the jury's finding that the defendant killed the victim in the course of an armed robbery or attempted armed robbery." *State v. Irish, supra*, at 217.

In the instant case appellant and her confederate shot and stabbed an elderly minister and shot his wife, killing the husband and rendering the wife in an impaired state. Appellant also committed an unrelated murder shortly thereafter. The State submits that the death penalty is not disproportionate for this offense and this offender.

CONCLUSION

The State proved beyond a reasonable doubt that Brandy Aileen Holmes murdered Julian Brandon in the course of a robbery, as well as proving the other aggravating factors. This type of first-degree murder warrants the imposition of the death penalty.

The State respectfully submits that the sentence imposed herein should be upheld.

Respectfully submitted,

/s/ Catherine M. Estopinal
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CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing sentence review memorandum has been mailed to:

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/s/ Catherine M. Estopinal
CATHERINE M. ESTOPINAL

APPENDIX 2

IN THE SUPREME COURT OF THE
STATE OF LOUISIANA

No. 2006-KA-2988

STATE OF LOUISIANA, *Plaintiff-Appellee*

v.

BRANDY AILEEN HOLMES, *Defendant-Appellant*

Appeal from Conviction
and Death Sentence Imposed

In the First Judicial District, the Parish of Caddo,
No. 226,819, Hon. Scott J. Crichton, Presiding.

THIS IS A DEATH PENALTY CASE

APPELLANT'S CAPITAL SENTENCE REVIEW MEMORANDUM

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INTRODUCTION

COMES NOW, APPELLANT, BRANDY HOLMES, through counsel, and pursuant to Rule XXVIII of the Rules of the Supreme Court of Louisiana, Article 905.9 of the Louisiana Code of Criminal Procedure, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 2, 3, 13, 16, 19, 20, 21, 22, 23, and 24 of the Louisiana Constitution of 1974, respectfully files this Sentence Review Memorandum in response to the State's *Sentence Review Memorandum* and the trial court's *Uniform Capital Sentence Report*. In respect of the latter, Appellant refers the Court to her *Defense Opposition to Factual Contents Uniform Capital Sentence Report and Capital Sentence Investigation*

Report, and incorporates it herein. Appellant also incorporates all facts, law and claims raised in her previously or subsequently filed appellate pleadings, including *Motion for Hearing to Determine Competency on Appeal*, and *Appellant's Brief*.

This Court has a constitutional obligation to review each sentence of death to determine if it is constitutionally excessive. This review, mandated by the legislature, safeguards a capital defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, § 20 of the Louisiana Constitution.[1] *State v. Hoffman*, 98-3118 (La. 4/11/00), 768 So. 2d 542, 589. "Scrupulous appellate review is constitutionally required in death

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[1] Art I, § 20 of the Louisiana Constitution provides: "[n]o law shall subject any person to euthanasia, to torture or to cruel, *excessive*, or unusual punishment." (emphasis added). *State v. Perry* 610 So.2d 746, 750 (La. 1992). "The framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in some respects." *State v. Sepulvado*, 367 So. 2d 762, 764 (La. 1979) ("The Louisiana Constitution of 1921 merely prohibited "cruel and unusual punishment." Article I, Section 12. In a deliberate change of wording, the new Louisiana Constitution of 1974 broadened the constitutional provision (and the duty of our courts in review of sentences) by providing, Article I, Section 20: "No law shall subject any person ... to cruel, Excessive, or unusual punishment." (Italics ours.) *The deliberate inclusion of a prohibition against "excessive" as well as "cruel and unusual" punishment adds an additional constitutional dimension to judicial imposition and review of sentences.* By it, the excessiveness of a sentence becomes a question of law reviewable under the appellate jurisdiction of this court. See La.Const. art. 5, Section 5(C).") (emphasis added).

cases . . . Before this court will affirm the imposition of the death penalty, all the information before us must be convincing that death would not be an excessive punishment." *State v. Smith* 400 So.2d 587, 593 (La. 1981) (citations omitted).

As part of this review, the Court must determine: "(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." La. Sup. Ct. R. XXVIII (2005).

Ms. Holmes' sentence of death is constitutionally excessive in that it was imposed under the influence of Passion, prejudice, and other arbitrary factors and it is disproportionate to the penalty imposed in other cases due to significant mitigation as well as the fact that Ms. Holmes is a woman dominated by her co-defendant Robert Coleman during the commission of the crime.

I. FACTS TO BE CONSIDERED FOR PURPOSES OF THE COURT'S EXCESSIVENESS REVIEW – THE FAILURE OF THE DISTRICT ATTORNEY AND TRIAL COURT TO PROVIDE ADEQUATE OR ACCURATE INFORMATION

An adequate capital sentence review cannot be performed without consideration of both mitigating

and aggravating circumstances. Indeed a proper consideration of all available mitigating evidence is a basic prerequisite to individualized sentencing, and a death penalty that is constitutional under the Eighth Amendment and Louisiana Constitution. As this Court holds, a death sentence is arbitrary and excessive if it is "imposed in disregard of numerous and persuasive mitigating circumstances which clearly outweigh any aggravating circumstances found to be present." *State v. Sonnier* 380 So.2d 1, 7 (La. 1979) (reversing excessive death sentence despite jury's finding of six aggravating circumstances, because of compelling nature of mitigation). *See also*, *Williams v. Maggio*, 679 F.2d 381, 388 (5th Cir. 1982) (" . . . the court must examine all possible mitigating circumstances and compare the case with all other murder cases from the affected judicial district in order to ensure that the sentence is not disproportionate").

Under Rule XXVIII, this Court established detailed procedures to facilitate its capital sentence review. In keeping with the aim of ensuring individualized sentencing, the procedures require both the trial court and the district attorney to present various categories of information relevant to the excessiveness determination; namely factors generally considered aggravating (such as the crime, the defendant's prior record and victim impact), and factors generally considered mitigating (such as family situation and background, education, mental and physical condition, drug use at the time of the offense). Due process requires that the statutorily mandated considerations

be taken into account in performing excessiveness review. The trial court is obligated to prepare and file a Uniform Capital Sentence Report (UCSR) containing pertinent details about the offense and the defendant, as well as a sentence investigation report prepared by a probation officer. The State is similarly required to submit a Sentence Review Memorandum (SRM) providing this court with a "synopsis of the facts in the record, concerning the crime and the defendant."

Both the trial court's UCSR and the state's SRM were inadequate. While providing quite detailed reviews of the circumstances of the offense and facts in aggravation, they both failed to give a "synopsis of facts in the record" of the substantial mitigating evidence in this case. The Uniform Capital Sentence Report in particular was riddled with inaccuracies and misrepresentations of the facts in the trial record, minimizing, mischaracterizing and inaccurately reporting compelling evidence of Ms. Holmes significant impairments and other mitigating evidence which was adduced in pretrial hearings and at trial, and filed into the record of this case. The court failed to provide information that was uncontroverted at trial regarding her thoroughly-documented history of brain damage, major mental illness, borderline mentally retarded intellectual functioning, physical and sexual abuse and neglect. For example, when asked at various points about defendant's mental health the trial court refers to past diagnoses of antisocial personality disorder, conduct disorder and

oppositional defiance disorder, and states that there are no other mental health considerations (Questions 14 and 16). The court failed to mention evidence of past and present diagnoses of far more severe (and more mitigating) debilitating mental disorders including PTSD, alcohol and drug dependence, chronic depression with psychotic features, as well as the numerous reports of psychotic symptoms and treatment with anti-psychotic medications which are contained in her juvenile records. The court also failed to detail the multi-faceted areas of brain dysfunction that was attested to through uncontroverted expert testimony at trial and at pre-trial hearings. Similarly the report states that there was no evidence that Defendant was under the influence of narcotics or dangerous drugs at the time of the offense; in fact the court's own expert, psychiatrist Charles Armistead M.D., concluded that Ms. Holmes was "perhaps influenced by the use of cocaine at the time" of the offense and the state's records reflect that Brandy has struggled with substance abuse issues since childhood. Appellant refers the Court to the *Defense Opposition to Factual Contents of Uniform Capital Sentence Report and Capital Sentence Investigation Report* for further details and for a more complete synopsis of facts in the record concerning the defendant, and corrections to the trial court's report.

The State's sentencing review memorandum omitted *any* reference to mitigating circumstances whatsoever.

As part of the UCSR and SRM, the trial court and State are also required to present information about the aggravating and mitigating factors in other first-degree cases from the same district and to compare them to the aggravating and mitigating circumstances in the current cases.[2] This is to aid the Court with the comparative proportionality aspect of its excessiveness review. An inference of arbitrariness arises if the imposition of a death sentence "is inconsistent with sentences imposed in similar cases in the same jurisdiction." *State v. Sonnier*, 380 So. 2d 1, 7 (La. 1979).

Yet in addressing the other cases in the district both the UCSR and the SRM, focus almost exclusively on details of the offense and aggravating aspects, with very little mention of mitigating factors in those cases, and in most cases, none at all. (Despite its significant deficiencies, the trial court's review of cases in the UCSR, is *identical* word for word, to the

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[2] In completing its review the trial court is instructed to "compare the sentence of this defendant in the aggravating and/or mitigating factors to the sentences of other convicted offenders with similar aggravating and/or mitigating factors of which you have knowledge". Rules of the Louisiana Supreme Court, Appendix B, Uniform Capital Sentence Report. Rule XXVIII sec. 4(b) provides that the state's Sentence Review Memorandum shall include "a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. . . . " The list shall include "a synopsis of the facts in the record concerning the crime *and the defendant*" and "a synopsis of the facts in the record concerning the crime *and the defendant* in the instant case." *Ibid.* (emphasis added).

relevant section of the State's Sentence Review Memorandum, filed 15 days earlier). In the discursive section of its report the trial court does not "compare the sentence of this defendant in the aggravating and/or *mitigating* factors to the sentences of other convicted offenders with similar aggravating and/or *mitigating* factors of which you have knowledge". Rules of Supreme Court of Louisiana, Appendix B. Uniform Capital Sentence Report, D.7 (emphasis added). Rather, the court *again* simply recites the facts relevant to the crime, with no mention of the extensive mitigation in Ms. Holmes case, nor of the impact that such mitigating evidence played in other cases.

The Court's UCSR and State's SRM therefore fail to perform the statutorily prescribed functions that are supposed to assist this Court in determining the constitutionality of Ms. Holmes death sentence. The data provided is insufficient, flawed and often incorrect. Consequently the ultimate conclusions reached by the trial court are of limited value. Appellant urges the court to perform its own thorough review of the record, and the facts of other similar cases, *de novo*. Due process requires it.

II. THE DEATH SENTENCE IN THIS CASE IS CONSTITUTIONALLY EXCESSIVE BECAUSE IT WAS IMPOSED IN THE FACE OF OVERWHELMING MITIGATING EVIDENCE

The mitigating evidence in this case is overwhelming. Ms. Holmes' death sentence flies in the

face of the most fundamental principles of our criminal justice system; that only the most culpable defendants who commit the most heinous crimes should receive the ultimate punishment, and that those with limited capacity to understand and control their actions, should not.

Brandy Holmes suffers from a myriad of severe mental and cognitive impairments including severe mental illnesses, organic brain damage, significant brain dysfunction in several areas, learning disabilities, alcohol and drug dependence, and borderline mentally retarded intellectual functioning. She was abused and neglected during childhood. She was raised by an alcoholic mother in an instable environment characterized by poverty, instability and violence. She ran away from home many times. Serious questions remain about the level of her involvement and culpability concerning the offense, and in particular, the greater culpability of her co-defendant Robert Coleman, who abused and controlled her, and the reliability of her numerous, contradictory "confessions" which are the *only* evidence that Ms. Holmes was present during the crime.

Brain Damage and Brain Dysfunction

The uncontroverted evidence adduced from mental health experts both in pretrial hearings and at trial demonstrates that Brandy Holmes was born with brain damage and Fetal Alcohol Syndrome, to an alcoholic mother, who drank throughout the

pregnancy. R. 4152-53, 6143-47. Testimony of Richard Williams, M.D. ("Williams"); R. 6199, Testimony of James Clifton Patterson, II, M.D., Ph.D. ("Patterson").[3] Neuropsychological testing found moderate organic brain dysfunction primarily to the left side of her brain. R. 4199, 6120, Testimony of Mark Vigen PhD ("Vigen"); R. 4156, 4172, 6138, Testimony of Williams. The specific impairments to Brandy's brain negatively impact her ability to: reason, foresee consequences, communicate, abstract and learn from experiences, control impulses, read verbal cues, and accurately interpret the reactions of others. R. 4199, Testimony of Vigen; R. 4161-62, 6161, Testimony of Williams. Subsequent neuro-imaging of Brandy's brain with Magnetic Resonance Imaging (MRI) and Positron Emission Tomographic (PET Scan) revealed visible damage to Brandy's brain considered to be "very significant, highly significant," by the psychiatrist and expert in functional neuron-imaging who testified at trial. R. 6199, Testimony of Patterson. The MRI and PET Scan revealed significant abnormalities in several areas of Brandy's brain, including: the amygdala, bilateral inferior temporal regions, superior temporal areas along the sylvian fissure, bilateral parietal regions, left medial temporal area, right putamen/globus pallidus, bilateral cerebellum frontal

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[3] "R. ___" refers to the record on appeal lodged with this Court.

regions. R. 3682, Report of Patterson. These findings were not contested by the prosecution.[4]

Learning disabilities and borderline retarded intellectual functioning

The life long nature of Ms. Holmes' substantial deficits are evidenced in her school records, and corroborated by educational testing prior to trial. She has a long history of profound learning disabilities. The Caddo Parish school system identified her as a child in need of special help at the age of six. She was classified as learning disabled and speech impaired; her difficulties included particular problems in reading, math, and communication, and difficulty with "visual and auditory processing and visual-motor integration". R. 674-695. She repeated the first and third grades and was socially promoted in special education through the 5th grade, at which point she entered the juvenile justice system and no longer attended a school set up by grade levels. R. 4122, 4184. Assessments at age ten years six months,

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[4] Unfortunately, the jury never heard testimony regarding the significant behavioral effects of the brain damage uncovered in neuro-imaging. The affected regions implicate several critical areas of functioning, including memory, emotion, attention, visual and auditory language processing, sensory processing, social-emotional relations, visual-spatial relations, personal identity, and temporal-sequential motor activity. Damage to these areas can result in a wide variety of impairments from memory loss and cognitive disabilities to problems with motor control, thought disorder and psychosis. http://brainmind.com.

showed that despite good attendance she was making "slow progress," she functioned at a 1st grade level for reading and spelling, and low 2nd grade level for math. She exhibited behavioral problems and had difficulty with peer relationships. She was involved in fights because other children called her a special education "nerd." R. 674-695. A psychiatrist described 12 year-old Brandy as "very regressive and not quite fitting in with the rest of the kids because of her low IQ."[5] In 1993 a progress report by the Office of Youth and Development stated she was "within the upper limits of the mentally retarded range." R. 2348, CD of Juvenile Records at 61.

Educational testing before trial revealed that at the age of 26, Ms. Holmes' academic skills in the areas of reading, math, broad knowledge, verbal comprehension, and visual auditory learning spanned an age-equivalent range of 6 years, 3 months to 11 years, 8 months. R. 4180. Overall Dr. Vigen's testing indicated that Ms. Holmes was functioning in the 4th-7th grade level in terms of academics and intellectual functioning. R. 4179. Dr. Williams testified pre-trial that Ms. Holmes functions like a 10-12 year-old. R. 4163.

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[5] In response to the same psychiatrist's question regarding what she would wish if she had three wishes, Brandy responded that "she would like for all children to have what they wanted and that nothing will hurt them and everybody should be rich." R. 2348, CD of Juvenile Records at 1235-1236.

Every doctor that evaluated Ms. Holmes placed her intellectual functioning at the borderline mentally retarded range. Drs. Vigen and Williams testified pre-trial that in addition to a full scale IQ in the 74-77 range, placing her in the bottom 6% of the population in terms of intellectual functioning, Ms. Holmes' adaptive functioning is extremely limited in 5 areas: social skills, self-direction, health and safety, functional academics, and work. R. 4194, 4169-70. Both court appointed experts found her to be of borderline intelligence. Dr. Seiden estimated her I.Q. at 75. R. 2350, R. 2356.

Mental illness

The record is replete with evidence that Ms Holmes is severely mentally ill. She first received psychiatric treatment at the age of 12 when she was committed to a psychiatric hospital in Mississippi.[6] At

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[6] Brandy had refused to eat for two days in an attempt to starve herself to death. She was committed to a psychiatric hospital in Mississippi. R. 2348, CD of Juvenile Records at 1235-40. At the hospital, Brandy said that she had been raped by an older boy. Unbelievably, Brandy's allegation of rape at age 12 by her sister's 16 year-old boyfriend was characterized at the trial of her case, through questioning by the assistant district attorney, as "consensual." R. 6101. At the time of this allegedly "consensual sex" on the part of a child not yet old enough to consent to sex, Brandy was described by a psychiatrist as "very regressive and not quite fitting in with the rest of the kids because of her low IQ." R. 2348, CD of Juvenile Records at 1239. Brandy clearly functioned at a much younger level of maturity than an average 12 year-old. In response to the same

(Continued on following page)

that time she was diagnosed with Post Traumatic Stress Disorder and Major Depression, diagnoses that were consistent from 1992 through a pretrial court-ordered expert evaluation performed in 2005 by George Seiden M.D. R. 6125, Vigen Testimony; R. 2363, Seiden Competency Evaluation.

As a child and adolescent, she was also diagnosed with conduct disorder and oppositional defiant disorder – childhood disorders. As she moved into adulthood she was diagnosed with Borderline Personality Disorder and Antisocial Personality Disorder.. Both pretrial and at trial, experts who were aware of Brandy's significant brain dysfunction attributed her antisocial behavior to her impaired brain functioning. R. 6120-21, Testimony of Vigen; R. 4161-63, 6161-62, Testimony of Williams.

Over the years, mental health experts have diagnosed Brandy with psychotic disorders and symptoms, including Major Depression with Psychotic Features. R. 4188, 6109-11, 6125-26, Testimony of Vigen. Records show a variety of symptoms including hallucinations, delusions, mania, self-harming, and bizarre behavior. R. 2384, CD of Juvenile Records, at 2849-2856.

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psychiatrist's question regarding what she would wish if she had three wishes, Brandy responded that "she would like for all children to have what they wanted and that nothing will hurt them and everybody should be rich." R. 2348, CD of Juvenile Records at 1235-1236.

Brandy Holmes was prescribed anti-psychotic medications in her adolescence (ages 15-19), such as Thorazine, Haldol, and Stelazine. R. 2384, CD of Juvenile Records.[7] As she moved into adulthood (19 until time of trial), she was prescribed anti-depressants such as Zoloft. R. 2384, CD of Juvenile Records;[8] R. 6163, Testimony of Williams. Court appointed expert Charles Armistead M.D. noted her "apparent history of psychotic disorder." R. 2355.

Childhood Abuse and Neglect

Brandy Holmes' problems were exacerbated by the neglect and abuse she suffered at her parents' homes, and a lack of appropriate treatment. She was born into poverty to an alcoholic mother who was unable to her child's needs. R. 4152-53, 4161, Testimony of Williams. Her parents separated when she was a baby. She spent time in both her parents' family environments; both were characterized by alcoholism, violence, and a failure to provide structure, safety and security to a severely impaired young girl. R. 4161, 6161, Testimony of Williams; R. 4200, Testimony of Mark P. Vigen, Ph.D. (hereinafter Vigen). A 1992 psychological evaluation of twelve year old Brandy found "evidence that Brandy has likely

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[7] Juvenile Records at 118, 149, 151, 257, 295, 337, 572, 645, 699, 701, 711, 713, 715, 717, 992-93, 1897, 2501, 2521, 2525, 2537, 2771, 2776, 2777, 2779, 2827, 2829.

[8] Juvenile Records at 1895, 1911, 2057, 2060, 2063, 2066, 2067, 2509.

suffered chronic rejection, abuse, or has been involved in a dysfunctional or chaotic family situation", that she "has likely been exposed to conflict, violence and hostility" and that she is "lonely, isolated and depressed." R. 2348, CD of Juvenile Records at 76. In 1994 a psychiatrist noted Brandy's early history of pica (eating non nutritive substances such as rocks), which is "indicative of disorders of parent-child nurturance and psychological deprivation in certain instances, and "which can also lead to any number of medical complications, including lead poisoning and neurological and behavioral disturbances" R. 2348, CD of Juvenile Records at 1251-001257.

Throughout her adolescence, Brandy alleged that she was sexually abused as a young girl by her father and other adults in her father's home, and gang raped at the age of 14. The allegations were never fully investigated or taken seriously at the time. R. 4161, 4166-67.[9] In 1993 an Office of Juvenile Services Custody Screening reported noted that she "is or has been the victim of sexual abuse." R. 2348, CD of

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[9] Records reflect that contemporaneous investigation into one particular rape incident confirmed that a boy several years older than 12-year old Brandy had sexual intercourse with her, but characterized the incident as "consensual". At trial the State denied this was rape (R. 6234) despite the clear law in Louisiana (and in Mississippi where the offense occurred) that such incident is *statutory rape*. No other evidence of sexual abuse was presented to the jury and the state did not attempt to refute any of the other sex abuse allegations evidenced in her juvenile records.

Juvenile Records at 23. In 1994 a psychiatrist at the Shreveport Mental Health Center recommended her for group therapy for sexual abuse survivors, but there is no evidence that this treatment was provided. R. 2348, CD of Juvenile Records at 648.

Despite Brandy's low functioning and behavioral problems, she never received testing which would have identified her significant brain damage and allowed for the development of appropriate interventions both at home and at school. Instead, Brandy was shipped back and forth between her parents' homes in Mississippi and Louisiana, when they could no longer tolerate Brandy's behavior. As she entered adolescence, Brandy's multiple problems manifested in increasingly destructive behaviors which included truancy, running away from home and group homes, suicide threats and efforts to physically harm herself, destruction of property, theft, and unauthorized entry of an inhabited dwelling. Following Brandy's commitment to a psychiatric hospital at age 12, it was recommended that she be placed in a group home where she would be adequately supervised and receive treatment she sorely needed. Despite this she returned to her father's home. R. 4186, 6123, Testimony of Vigen; R. 4161, 4164, 6161, Testimony of Williams. R. 2348, CD of Juvenile Records at 10-13.

At the age of 13, dependency proceedings were instituted because Brandy's mother was unable to respond to Brandy's needs. Simultaneously Brandy was found delinquent for possession of a concealed weapon, after she carried knives to school for

self-protection. She was removed from her mother's home and entered the juvenile system. After failed placements in group homes who were unable to control her, she was sent to LTI.[10] During her brief release into her mother's care in 1994, 14-year-old Brandy became pregnant and had an abortion. R. 2348, CD of Juvenile Records at 1251-1257. Within a couple of months she was back in the juvenile system, for burglary. She was sentenced to juvenile life. The juvenile judge, who had followed her case over the years, recommended that she be placed into long-term in-patient psychiatric care. Due to administrative red-tape, and despite the intervention of the chief juvenile judge who ordered her placement in a psychiatric facility, this did not occur.[11] Instead she was placed in Louisiana's punitive juvenile detention facilities where she remained for the rest of her

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[10] An evaluator at LTI in Monroe who assessed Brandy in 1993 at the age of 14 concluded that Brandy may have been caught up in the juvenile system for acting-out behavior which would be far more appropriately addressed in a halfway house or juvenile residential treatment home. R. 2348, CD of Juvenile Records at 336.

[11] When Brandy was sent to LTI, the Chief Judge of the Juvenile Court intervened and ordered her long term placement and treatment in a psychiatric facility, and stated he wanted Brandy out of detention immediately. However because of an administrative hitch she never received the vital treatment she needed. A DPSC Memorandum records that "Brandy Holmes's treatment needs are trapped between two state agencies and new federal guidelines," a difficulty that was never overcome. R. 2348, CD of Juvenile Records at 648.

childhood.[12] There, Brandy was charged on multiple occasions with battery and was ultimately sentenced as an adult to two years at the Louisiana Correctional Institute for Women. Second SIR at 6-8.

Questions concerning competence

Questions remain as to Ms. Holmes' competence. While two pre-trial court-ordered sanity evaluations found that Brandy was competent to stand trial, the psychologist and psychiatrist who knew of Brandy's brain damage and dysfunction both questioned her competence to assist counsel in her defense given her severe limitations. Dr. Vigen testified pretrial that Brandy's ability to give meaningful assistance to her trial attorneys was compromised. "We're talking about things [Brandy] may know something about, then be able to help both of you [defense attorneys] and inform you. All that is a complex process. She's going to have limitations doing that." (R. 4200-4201,

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[12] Brandy was incarcerated at the Monroe and Jetson juvenile prisons during a period of time when the U.S. Department of Justice found "serious, systemic, and, in certain cases, life-threatening, harm being inflicted on the juveniles in all four facilities. . . . The violence at the facilities is so pervasive that our consultant concluded that 'the greatest responsibility for the problems seen must be directed to the institutes' administrators and senior staff. It is clear that these men and women either knew or intentionally sought not to know of the serious violence to children that was occurring [at the facilities].'" U.S. Department of Justice Findings Letter, Addressed to Governor Foster, dated June 18, 1997.

Vigen). Dr. Williams agreed, testifying that Brandy would have difficulty assisting counsel in her defense.

Dr. Williams also questioned Brandy's fundamental ability, given her brain dysfunction, to assimilate the difference between right and wrong and act accordingly. He testified pretrial that while Brandy can articulate the difference between right and wrong "she doesn't integrate that very well. . . . She never assimilates that even though she can articulate the difference." (R. 4171, Williams).

Questions concerning Brandy's role in the crime

The neuropsychological testing and neuroimaging findings of brain damage and dysfunction, as well as Brandy's borderline intellectual functioning, history of abuse and neglect, and immaturity, all raise significant doubt regarding her guilt, and certainly her degree of participation and culpability.

Brandy and her boyfriend at the time, Robert Coleman, were both charged with capital murder in this case. Coleman was older not only in chronological years (Brandy was 23, Coleman was 33), but was light years ahead in terms of maturity (Brandy functioned at an age-equivalent of 9-13). The psychiatrist who examined Brandy and interviewed family members testified pretrial, again in uncontroverted testimony, that Brandy did whatever her boyfriend Coleman told her to do. She was physically abused by him and controlled by him. At times she

had tried to leave him and he had threatened her, so she stayed. R. 4164-65, Williams.[13] Even the Assistant District Attorney who prosecuted this capital case expressed concern as to the level of Brandy's involvement in the murder for which she has been convicted and sentenced to death:

> Assistant Caddo Parish District Attorney Hugo Holland was interviewed concerning this report. It is his opinion that Robert Coleman may have played a more significant role in the instant offense than Brandy Holmes related to detectives. Certain forensic evidence at the scene leads Mr. Holland to believe that Robert Coleman could have been the murderer of Mr. Brandon and possibly could have shot him upon first entering the residence. Mr. Holland maintains that, because of several conflicting stories given by Holmes to interviewers, it probably will never be known who did exactly what in the Brandons' residence on the date of the murder and attempted murder. According to Mr. Holland, one thing is certain; there was enough forensic evidence found at the crime scene to indicate that at least two persons committed the offenses. Mr. Holland related

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[13] Throughout her juvenile records are references to the fact that Brandy was easily influenced and persuaded by peers, as well as recommendations that she stop allowing peers to influence and improve her ability to make her own decisions. R. 2348, CD of Juvenile Records at 8, 24, 295, 314, 318, 325, 421, 652, 3203.

> that he believes Holmes' personality is one that would exhibit tendencies to cover for and/or make excuses for an individual that she cared for, namely Robert Coleman. While speaking with a female detective in one interview, Holmes asked the detective if she had ever loved someone so much that she would do anything in the world for him. The detective then asked if the subject was referring to Robert Coleman, and Holmes replied that she was.

First SIR, at 5-6 (Defense Opposition To Factual Contents Of Uniform Capital Sentence Report and Capital Sentence Investigation Report, Ex. A.)[14]

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[14] It became clear from correspondence attached to the SIR (submitted to the Court on May 30, 2006) that a previous report had been furnished to this Court. Ms. Holmes sought production of the earlier versions of the SIR. Pursuant to this Court's March 5, 2007 order, Ms. Holmes received a copy of the first SIR (submitted to the Court prior to April 21, 2006). Based upon other information provided with the first SIR (this Court's explanation and the affidavit of the Probation and Parole Officer who completed both SIRs), it is Ms. Holmes' understanding that the first SIR submitted to this Court was also provided to the District Attorney's Office and was revised and resubmitted to the Court based upon written information provided to the Probation and Parole Officer by the District Attorney's Office. Defense counsel was not provided with a copy of the first SIR at the time it was completed, nor was defense counsel provided with the opportunity to revise it. The initial SIR (provided to the Court prior to April 21, 2006) will be referred to herein as "first SIR" and the second SIR (provided to the Court on May 30, 2006) will be referred to herein as "second SIR."

According to the state's experts at trial, the blood evidence shows that Robert Coleman was standing in close proximity to Mr. Brandon when he was shot and killed, consistent with Coleman being the shooter or holding the victim at the time he was shot. R.5755. As Ms. Holmes prosecutors argued to Robert Coleman's jury, "That puts those boots [Coleman's] on the killer shoving that gun up under his chin and pulling the trigger . . . About as far away as you are going to get from that is in a very small radius standing next to him." Coleman Record at 4714.[15] In Robert Coleman's trial the state presented evidence that Coleman himself confessed to being the shooter.[16]

While it is undisputed that Ms. Holmes had some knowledge about the homicide, the *only* evidence that Ms. Holmes was present at the scene during the crime, was her statements to police. Her mental impairments, as well as Coleman's ability to control and manipulate her, add to doubts about their reliability. Brandy gave multiple contradictory statements "confessing" to various degrees of involvement in the homicide; four of which were recorded, and several of which were not. Despite physical evidence that

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[15] "Coleman Record ___" refers to the record on appeal lodged with this Court in *State v. Coleman*, 2006-0518.

[16] At Robert Coleman's trial the state presented evidence of Coleman's confession to two cell mates, including testimony by Bobby Evans that Coleman admitted to shooting Julian Brandon. Coleman Record R. 4392, 4460, 4513. It is undisputed that Mr. Brandon was shot just one time.

Coleman was closely involved in the homicide, Brandy never implicates him; in fact in only one version of the crime does she place him at the scene at all. Her statements are littered with inconsistencies, both internally and as between statements, and contain numerous inaccuracies. The trial court excluded Holmes' statements from evidence at Robert Coleman's trial, in part because they were so contradictory and unreliable.[17] Coleman's ability to manipulate Brandy continued after they were arrested; he manipulated her into signing an affidavit exculpating him entirely from the incident, suggesting to her that it was in her best interests and that he would get her out of jail when he was released.[18] He also tried, unsuccessfully, to persuade her to plead guilty, telling her he'd get her plea changed when he was out. R.2030, 2099.

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[17] Sustaining the state's hearsay objection to their admissibility the trial court ruled: "the hearsay statements of Brandy Holmes will not be admitted. There are lots of them. They all go in different directions." R. 4937. At Coleman's oral argument the state confirmed its recollection that this was a key part of the court's rational for excluding one of Holmes's statements, from admission at Coleman's trial; Hall represented that the court excluded Ms. Holmes' statement because she gave so many different stories and they bore "no indicia of reliability".

[18] This affidavit was one of the documents the judge excluded from evidence at Coleman's trial. Coleman Record 4937-4939.

There are similar uncertainties about the degree of Ms. Holmes participation in the Blaze homicide. Again, the only person linked by physical evidence to the Blaze homicide is Robert Coleman, who, based on blood evidence state experts concluded was sitting next to Blaze in the car when he was killed. R.6035.[19]

The mitigating evidence in this case is overwhelming; Ms. Holmes' death sentence was imposed "in disregard of numerous and persuasive mitigating circumstances which clearly outweigh any aggravating circumstances found to be present". *State v. Sonnier*, 380 So. 2d 1, 8 (La. 1979). Her sentenced should be reversed.

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[19] Coleman had motive for killing Blaze. There is evidence that Coleman was jealous, and violently possessive of Brandy Holmes, R.1429-1430, 1297-1301, and that he may have believed that Holmes had a sexual relationship with Terrance Blaze when she was released from jail in 2002 and was pregnant with Blaze's child. R.1429-1430, 1356, 1375. Elsewhere in the record evidence suggests that Blaze was afraid of a black man who was after him because of a girl; Blaze's girlfriend, Lavisha Edwards, told the police that that the day before the homicide Blaze left her at the bus terminal because he was concerned about being mugged or getting into an altercation with "this dude down there who was gonna start up messing with him behind a girl", a black guy. R. 1605-1606. This information was not presented to the jury, but was included in reports filed into the record by the state in discovery pre-trial.

III. THE EXECUTION OF PERSONS WITH FETAL ALCOHOL SYNDROME VIOLATES THE FEDERAL CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES LOUISIANA'S BROADER PROHIBITION AGAINST CRUEL, EXCESSIVE OR UNUSUAL PUNISHMENT.

In *Atkins v. Virginia,* 536 U.S. 304 (2002), significant deficiencies such as those demonstrated in the record Ms. Holmes' case and attributable to Fetal Alcohol Syndrome (FAS) "do not warrant an exemption from criminal sanctions, but diminish [a defendant's] personal culpability." *Id.* at 320. The *Atkins* Court recognized longstanding jurisprudence that the death penalty is reserved for those most deserving of the most extreme and final punishment. *Id.* at 319 (citing *Godfrey v. Georgia,* 446 U.S. 420, 433 (1980) (reversing death sentence because crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder"). The Court observed that there are certain characteristics of mental retardation, specifically "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," which "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* at 317-18. Ms. Holmes demonstrated at the pretrial hearing in her case that

because she suffers from FAS, she possesses all those characteristics.

Due to FAS, Ms. Holmes exhibits the diminished capacity and culpability of a mentally retarded person. Dr. Vigen found her to have "deficiencies in processing information . . . deficiencies and limitations." R. 4197-98. Dr. Williams agreed. R. 4171. Dr. Vigen also found, through neuro-psychological testing, that Ms. Holmes has significant limitations in her ability to communicate. R. 4182, 4198. Dr. Williams concurred. R. 4171.

Likewise, due to FAS, Ms. Holmes has diminished capacities to abstract from her mistakes and engage in logical reasoning:

> She has difficulty with abstraction. I would describe her as a single focused, concrete type thinker. We gave her a test called the category test which is a very good measure of abstract thinking or fluid intelligence. And by that I mean presenting her with a visual problem, asking her to develop a hypothesis about what's wrong, then seeing whether she can test the hypothesis tasks to get the right answer by being told that this is correct or this is incorrect. So she's not able to generate hypotheses, test the hypotheses, learn from the errors or the accurate responses, and then go on to respond accurately until the problem changes where she has to do it again. She lacks the ability to think on an abstract problem, abstract solving is poor.

R. 4183. In other words, Dr. Vigen concluded: "from a cognitive perspective, she has limitation in terms of reasoning; drawing one conclusion from the other, seeing cause and affect [sic] relationships, and coming to reasonable conclusions sequentially. She does not do well." R. 4199. As a result, "[she] doesn't look at the results of her behavior of [sic] her actions and learn from them." *Ibid.* Dr Williams agreed:

> She has difficulty generalizing what's happened due to her behavior so she doesn't change her behavior. Her perceptions don't change with new information. She keeps doing the same thing over and over and over.

R. 4162.

Ms. Holmes also doesn't think before she acts: she does not have the capacity to control her impulses: "I think she lives in the moment or what's going on. She doesn't evaluate her behavior or the basis for it or the motive. It's just kind of based on what she feels at the time." Dr. Williams explained, "I think that's frontal lobe damage; I think executive function." R. 4162. Dr. Vigen agreed that Ms. Holmes "[a]bsolutely" has limitations in her control of impulses." R. 4198. Finally, both doctors opined that Ms. Holmes is impaired in her ability to understand the reactions of others. "She has a failure to notice how others respond to her." R. 4161. Dr. Vigen explained, "[s]he misperceives. . . . [I]t's difficult for her to read other people or look to other people and really understand their reactions." R. 4198-99.

In addition to Ms. Holmes' multiple impairments, both doctors testified to characteristics resulting from FAS that might make her more susceptible to a sentence of death despite the safeguards of capital jurisprudence. Dr. Vigen testified that Ms. Holmes' would "be less able than people without these deficiencies to give meaningful assistance to her attorneys." R. 4201. She would also make a poor witness because she is impulsive and emotionally reactive; she doesn't speak well, understand the import of questions, nor does she "present as someone who takes this seriously." R. 4201-02. Dr. Vigen also expressed his opinion regarding Ms. Holmes' demeanor, and how it could be misunderstood by the jury:

> Q: Could her demeanor create unwarranted impression of lack of remorse?
>
> A: Yes.
>
> Q: Please explain.
>
> A: Well, some people might not understand her facial characteristics. They may think there is something wrong with her just by looking at her. Other people might determine there is something demonic or evil about her. Her demeanor is different and distant and almost like disconnected.

R. 4202. Dr. Williams concurred on all three counts. He testified that Ms. Holmes would "have difficulty assisting counsel" and would make a poor witness

due to the fact that she is impulsive, reactionary, and "gets into story telling and becomes enamored with the attention that she's getting instead of what she's saying." R. 4173. Her demeanor would give a jury the unwarranted impression of lack of remorse because Ms. Holmes lacks empathy and has difficulty controlling her emotions. R. 4173.

Ms. Holmes' significant impairments, attributable to FAS, render her death sentence cruel and unusual punishment. As the Court explained in *Atkins,* there are only two social purposes that justify the imposition of death: retribution and deterrence. A punishment violates the Eighth Amendment when it serves no legitimate societal purpose: "Unless the imposition of the death penalty . . . 'measurably contributes to one or both of these goals [of retribution and deterrence], it is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Atkins* at 319 (quoting *Enmond v. Florida*, 458 U.S. 782, 798 (1982)). Looking to the characteristic disabilities of persons with mental retardation, the Court concluded that "the lesser culpability of the mentally retarded offender surely does not merit [death as] retribution." *Ibid.* It likewise found that the purpose of deterrence would not be served by executing the mentally retarded given that their very limitations preclude thoughtful behavior in response to the law that those guilty of the most depraved murders will be sentenced to death. *Id.* at 319-20. Due to FAS, Ms. Holmes falls clearly into the

category of persons for whom the goals of retribution and deterrence serve no legitimate societal purpose.

The Supreme Court pointed out in *Atkins* that the exemption of the mentally retarded from execution served other legitimate ends of the criminal justice system, including due process and the enhanced reliability necessary in capital sentencing proceedings:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As Penry demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.

Id. at 320-21 (citing *Penry v. Lynaugh,* 492 U.S. 302, 323-25 (1989)) (internal citations omitted). Both experts testified to limitations in Ms. Holmes' ability to give meaningful assistance to counsel, to testify, and the risk that her demeanor would be erroneously used against her, giving the impression of lack of remorse.

Specifically a propos to this Court's review of death sentences for excessiveness, Article I, § 20 provides even greater protection against cruel and

unusual punishment than does the Eighth Amendment to the United States Constitution.

> In Art., I § 20 of the Louisiana Constitution of 1974, the people provided that "no law shall subject any person to euthanasia, to torture or to cruel, excessive, or unusual punishment." (emphasis added.) The framers of our state constitution clearly intended for this guarantee to go beyond the scope of the Eighth Amendment in some respects and to provide at least the same level of protection as the Bill of Rights and the Fourteenth Amendment in all others.

State v. Perry, 610 So.2d 746, 750 (La. 1992) (citing *State v. Sepulvado,* 367 So.2d 762 (La. 1979)). Specifically, the addition of the word "excessive" to Article I, § 20 adds an *explicit* requirement of proportionality that is only *implicit* in the Eighth Amendment:

> The deliberate inclusion of a prohibition against "excessive" as well as "cruel and unusual" punishment adds an additional constitutional dimension to judicial imposition and review of sentences. By it, the excessiveness of a sentence becomes a question of law reviewable under the appellate jurisdiction of this court. . . . The appellate enforcement of the constitutionally intended prohibition of excessiveness of punishment disproportionate to the offense must therefore be something more than the passing on the constitutionality of a statute penalty in a vacuum devoid of content concerning the circumstances of the crime and of the offender.

Sepulvado, 367 So.2d at 764, 767. *See also, State v. Wilson*, 2001-2815 (La. 11/22/02); 836 So.2d 2, 4 (imposition of sentence, even if within the statutory limit, may violate a defendant's constitutional right against excessive punishment). This Court cannot merely abdicate consideration of the circumstances of the offense and the offender to the jury; it must also consider *de novo* and based on the record before it whether the sentence is excessive.

Ms. Holmes' sentence of death is clearly excessive. That she suffers from FAS, with impairments identical to those described in persons with mental retardation, renders her sentence of death excessive *and* cruel and unusual, and therefore unconstitutional. This Court should vacate the sentence of death and remand her case to the trial court to impose a life sentence.

IV. THE SENTENCE OF DEATH IS EXCESSIVE BECAUSE THE JURY IN MS. HOLMES CASE, ENCOURAGED BY THE PROSECUTION, FAILED TO GIVE MITIGATING EFFECT TO SUBSTANTIAL MITIGATING EVIDENCE.[20]

The United States Supreme Court has repeatedly recognized the very real danger that jurors may be

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[20] The prosecution's erroneous representation of the law in both voir dire and closing argument to the jury also violated Ms. Holmes' right to due process under the state and federal constitutions.

confused by evidence presented in mitigation of a capital crime and erroneously consider it as aggravating evidence. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002). The combination of 1) the court's failure to instruct jurors that Fetal Alcohol Syndrome (FAS) should be given mitigating effect, and 2) the prosecution's repeated argument that giving mitigating effect to evidence of FAS would in fact *contaminate* the jury's decision with the forbidden passion and prejudice resulted in the jury disregarding the substantial mitigation presented by the defense. The jury's failure to be instructed upon and to consider mitigating evidence resulted in an unconstitutionally excessive sentence of death which this Court should reverse.

In *Penry*, the United States Supreme Court found that without an instruction to jurors indicating that the defendant's mental retardation should be given mitigating effect, the jury may well have improperly considered it as supporting a sentence of death. Because the Texas jury was required to answer three questions, special issues, in determining the appropriate punishment, life or death, but was never told to consider mental retardation as a mitigating circumstance which diminished moral culpability, the sentence of death violated the Eighth Amendment.

> Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral

> response" to that evidence in determining whether death was the appropriate punishent. We agree.

Id. at 322. As a result, Penry's sentence of death was set aside.

The decision was premised upon fundamental Eighth and Fourteenth Amendment jurisprudence inundating that a jury

> not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumtances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in the original). It is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). Moreover, "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry,* 492 U.S. at 318. When the defendant is not allowed to present the evidence, or the sentencer is able to give it something other than mitigating effect, the sentence does not meet the constitutional requirement that is be individualized

and relaiable. *Ibid*; *see also Atkins,* 536 U.S. at 320-21.

In Ms. Holmes' case, the prosecutor relentlessly argued that the jury *should not* consider evidence of a difficult childhood and of FAS in determining whether Ms. Holmes should be sentenced to life or death.

> "Defense is asking you to take a heinous act, a horrible act that has inflicted all this suffering on people and make it something less. Say, well, it's not as bad. Remember, that's what mitigating means. It's not as bad that Brandy did these things because of FAS. . . . To ask you to *somehow discount the severity of her actions on that basis I think defies reason. It defies the entire purpose for which we have the ultimate penalty which is that it is proportional,* that it is just in certain cases, and to say that this case doesn't deserve the death penalty because of these little things."

R. 6217. As the prosecutor later amplified, "what you've seen is a play on your sympathy, upon your passion, on any prejudices you may harbor. But you know from instructions it's improper." R. 6231. *See also* R. 6211 (can't call FAS mitigating); 6212 (saying Brandy's mother drank or that Brandy had FAS "doesn't mitigate anything"); 6218 (implying mitigation must rise to level of insanity); R. 6219 (anything short of an inability to choose – insanity – doesn't constitute mitigation). The prosecutor's argument dismantles the past 30 years of capital

jurisprudence by saying it is actually improper, illegal, to consider Ms. Holmes' moral culpability by giving mitigating effect to her background and mental impairments.

In conjunction with its erroneous arguments to the jurors instructing them to disregard FAS because it would contaminate their sentencing decision with passion and prejudice, the prosecution also repeatedly pointed to aspects of Ms. Holmes' FAS that it argued illustrated *bad* character and propensities and should therefore be considered in support of guilt as well as a sentence of death. At the guilt phase the prosecution shamelessly capitalized upon Ms. Holmes' demeanor and actions, all due to her significant limitations, to argue that she was a cold, calculating killer who ridiculed and laughed at the plight of the victims of the homicides. In the guilt phase closing, the state argued that her speech tone minimized the seriousness of the Brandon crime when she said to her nephews "let's go see" in the same tone she would say "let's go get ice cream." R. 5786. The state argued, from Ms. Holmes' statements, that what a person is "covering up is usually worse than what they admit to." R. 5793. And finally, it argued that based on Ms. Holmes' expressions in her statements, she had contempt for life. R. 5811. In sentencing the prosecution argued that the jury should give no thought whatsoever to reduced culpability based on debilitating impairments, that it should disregard its duty to exercise discretion guided by statutory mitigating circumstances, and instead

return a sentence of death based purely upon the horrible facts of the crime. It was the manifestation of Ms. Holmes' very impairments that the prosecutor capitalized on in doing so. R. 6217 (quoted *supra*).

The court's instructions to the jury regarding their consideration of mitigating circumstances in no way instructed them that FAS should be given mitigating effect. The court merely read the list of statutory mitigating circumstances and instructed jurors they could consider anything else they wanted as mitigation. R.6244. At the same time, the court instructed jurors that it must consider the character and propensities of the victim giving only one example of character and propensity – the commission of another homicide. R. 6241-42. Unfortunately, this left jurors with an understanding that character and propensity evidence consisted of "bad" facts, aggravating facts, about Ms. Holmes' character and propensities, not reduced moral culpability for which a sentence of life would be more appropriate.[21]

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[21] The prosecution repeatedly told jurors in voir dire that character and propensity evidence would constitute further aggravating evidence to be weighed in favor of death. "Remember, we said this is a big one. Character and propensities of the offender. Has the offender been convicted of a serious offense or committed another serious offense before?" R. 5220. *See also* R. 4633 (erroneously characterizing bad character evidence as aggravating circumstances and consisting of such things as criminal history while defining good character evidence as the defendant playing a lesser role in the crime).

The situation was identical in *Penry*. Given the Texas statute in Penry's case, the jury had likely considered mitigating evidence as aggravating evidence, without the benefit of an instruction directing them to consider evidence of mental retardation aggravating. As in *Penry*, Ms. Holmes' sentence of death must be set aside because it constitutes cruel, unusual, and excessive punishment.

V. THE DEATH SENTENCE IN THIS CASE IS DISPROPORTIONATE BECAUSE NO ONE ELSE WITH SUCH POWERFUL MITIGATING EVIDENCE HAS BEEN SENTENCED TO DEATH

Comparative proportionality review supports the conclusion that death is disproportionate in this case. As noted above, the analysis by the State in its SRM and by the Court in the UCSR failed to consider the powerful mitigating circumstances in reaching their conclusions and therefore failed to perform a critical function of the review.

A. The law requires that this court consider mitigating circumstances as an essential part of its proportionality review

The state's cursory discussion of proportionality focuses on the jury's finding that the homicide was committed in the course of an armed robbery or attempted armed robbery. The state cites prior cases

in which the death penalty has been returned in cases of armed robbery, implying that this Court has established a de facto rule that the death penalty is essentially always appropriate in an armed robbery case. The state's focus on the armed robbery aggravator subverts the statutory scheme and the constitutional rights it protects. First, it conflates the sufficiency of evidence review relating to aggravating circumstances, with the proportionality analysis. Proportionality is *not* limited to review of existence of aggravating circumstances. As the Court made clear long ago:

> Rule 28 of this court establishes a *three* step review for evaluating the appropriateness of a death sentence. The mere existence of a three step process indicates that a death sentence may be excessive *even if sufficient ground exists for each aggravating circumstance found by the jury.*

State v. Sonnier 380 So.2d 1, 7 (La. 1979) (*emphasis added*) (finding death sentence that was supported by six aggravating circumstances was excessive in light of the mitigating evidence). To automatically affirm the proportionality of the death sentence based on the existence of a particular aggravator, does violence to the statutorily prescribed procedures, and violates Due Process.

More importantly the refusal to even consider mitigating circumstances as part of a proportionality review would undermine the principals enforced by individualized sentencing just as the mandatory

death penalty does. "Comparative proportionality review by this court has focused principally on mitigating circumstances". *State v. Jones,* 474 So. 2d 919, 938 (La. 1985). No single factor can render the death penalty automatically appropriate. *See Woodson v. North Carolina,* 428 U.S. 280 (1976) (holding automatic imposition of death penalty for first degree murder unconstitutional); *Roberts v. Louisiana,* 428 U.S. 325 (1976) (same).

B. The greater number of first degree cases involving crimes of armed robbery have resulted in jurors rejecting death in favor of a life sentence

The state's argument is flawed because it ignores cases in which a life sentence was returned. Proportionality assessment requires a review of "similar cases" La. Sup. Ct. R. XXVIII which means, not just cases where the death penalty was returned, but also those in which it was not. To effectively limit the pool to death cases violates the spirit of the statute, and Due Process. Moreover, while death cases are crucial for providing data about what factors may make a case death worthy, it is the cases in which a life sentence has been returned that illuminate the factors present in cases where death was found to be inappropriate. It is a fallacy to argue that because there are cases with similar aggravating factors in which the death penalty returned, death in any case with those aggravating factors is

proportionate. Aggravating and circumstances must be viewed contextually with mitigating factors. This Court should not sanction the state's selective picking and choosing of cases and picking and choosing of comparison factors, to support an unwarranted finding of proportionality.

Moreover, the state's argument fails on its own data: in Caddo Parish there have been *eleven* first degree murder cases in which a *life* sentence was imposed where the jury found the crime to have been committed in the course of armed robbery. *State v. Donaldson,* 391 So.2d 1182 (La.1980); *State v. Washington,* 407 So.2d 1138 (La. 1981), *State v. Nicholson,* 437 So.2d 849 (La. 1983); *State v. Birdsong,* 452 So.2d 1236 (La.App.2d Cir. 1984); *State v. Brown,* 478 So.2d 600 (La.App.2d Cir. 1985); *State v. Calhoun,* 554 So.2d 127 (La. App.2d Cir. 1989), *writ den.* 558 So.2d 601; *State v. Haynes,* (La.App.2d Cir. 11/1/95), 662 So.2d 849, *writ den.* 95-2768 (La. 2/16/96), 667 So.2d 1050; *State Gay,* 29,434 (La.App.2d Cir. 6/18/97), 697 So.2sd 642; *State Tolbert,* 30, 821 (La.App.2d Cir. 8/19/98), 716 So.2d 949, *writ den.* 98-25262 (La. 1/15/99), 736 So.2d 207; *State v. Webb,* 32,607 (La.App.2d Cir. 1/26/00), 750 So.2d 479, *writ den.* 2000-0593 (La. 12/8/00), 775 So.2d 1078; *State v. Turner,* 37,162, (La.App.2d Cir. 10/29/03), 859 So.2d 911, *writ denied* 2003-3400 (La.3/26/04) 871 So.2d 347.

In contrast, only *ten* first degree murder cases with that aggravating circumstance resulted in a death sentence that was upheld by this Court after

proportionality review.[22] *State v. Glenn Ford* 489 So.2d 1250 (La. 1986); *cert. granted and remanded, Ford v. Louisiana,* 479 U.S. 1077, (1987); *on remand* 503 So.2d 1009 (La. 1987), *cert. denied, Ford v. Louisiana,* 498 U.S. 992 (1990); *State v. Nathaniel Code,* 627 So.2d 1373 (La. 1993); *State v. Percy Davis,* 92-1623, (La. 5/23/94), 637 So.2d 1012; *State v. Michael Cooks,* 97-0999 (La. 09/09/98), 720 So.2d 637; *State v. James Tyler III,* 97-0338 (La. 9/9/98), 723 So.2d 939; *State v. Bobby Hampton,* 98-0331 (La. 4/23/99), 750 So.2d 867; *State v. Cedric Edwards,* 97-1797 (La. 7/2/99); 750 So.2d 893; *State v. Daniel Irish,* 00-2086, (La. 01/15/02), 807 So.2d 208.

C. Ms. Holmes' case presents more substantial and compelling mitigation than any other Caddo Parish case resulting in a sentence of death

No defendant sentenced to death in Caddo parish had such strong mitigating evidence as Brandy Holmes:

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[22] Death was also imposed in the following cases but they have not been subject to proportionality review by this Court *State v. Darrell Draughn*; 05-1825, (pending appeal); *State v. Robert Coleman* 2006-0518 (La. 11/02/07) 2007 La. LEXIS 2392 (La. 2007), (conviction reversed on appeal) *rehearing denied* 1/7/08; *State v. Corey Williams* 2001-1650 (La. 11/01/02) 831 So. 2d 835 (remanded to trial court for determination of mental retardation claim, where found to be mentally retarded under *Atkins v. Virginia* and sentenced to life), *State v. Aaron Wilson* 2003-1229 (La. 3/30/05), 899 So. 2d 551 (remanded under *Roper v. Simmons* and sentenced to life).

1. Severe mental illness, including diagnoses of PTSD since age 12, resulting from a history of trauma
2. Prior diagnoses and treatment for psychosis
3. Brain damage and significant brain dysfunction in multiple areas (as a result of her mother's substance abuse during pregnancy
4. Profound learning disabilities identified from age 6
5. Low IQ, borderline intelligence
6. Alcohol and drug addiction, and possible intoxication at the time of the offense
7. Subjected as a child to neglect, violence, abuse, poverty, and raised by an alcoholic mother
5. Victim of sexual abuse
6. Significant doubt about her role in the crime including evidence implicating her co-defendant – lesser role

Importantly, Brandy's brain damage and dysfunction, history of abuse and neglect, history of mental illness (that was not by any means confined to childhood conduct disorders and Antisocial Personality Disorder), her borderline mentally retarded intellectual functioning, longstanding learning disabilities, and her emotional immaturity *were not contested by the prosecution*. The State's own evidence

in Coleman's trial implicated Coleman as the shooter and the trial prosecutor has acknowledged the undue influence Coleman may have had on Ms. Holmes.

None of the defendants receiving the death penalty had anything like the extent of mitigating evidence as in the current case. In both Glen Ford and Nathaniel Code's cases this Court found that there were no statutory mitigating circumstances present at all. *Ford*, 489 So.2d at 1264; *Code*, 627 So.2d at 1386. In the other death cases mitigating evidence was apparent from the record, but in every case it was more limited than in the current case, and/or the aggravating evidence was stronger. Percy Davis was convicted of two counts of first degree murder as well as an unadjudicated homicide. The record indicated he had cognitive impairments, low intellectual functioning, brain damage, and drug and alcohol addiction, but the record lacks the extensive evidence of mental illness, history of poverty, neglect and abuse, and lesser role/culpability which is present in the current case. *Davis*, 637 So.2d at 1029-1031.

Michael Cook's crime, like in Holmes case was a home invasion robbery, but there were two surviving victims, not one. In addition, Cooks had an extensive history of adult arrests for violent felonies, including aggravated assaults, attempted second degree murder, and was a heavily involved gang member for several years. Mitigating evidence in that case included his low IQ, special education history, that he was raised by an abusive mother in a violent family,

and had drink and drug involvement, but did not suffer the serious substance addiction, mental heath problems, and brain damage, that Ms. Holmes labors under. *Cooks*, 720 So.2d at 651-654.

James Tyler's crime involved three victims (two of whom survived). All three were shot cold bloodedly in the head at point blank range; evidence of an unadjudicated robbery shooting (attempted murder) was also introduced. Mitigating evidence involved mental health problems and a troubled childhood. Ms. Holmes suffered all that, but much more. In Tyler, there was no evidence of brain damage, brain dysfunction, low intellect, or addiction problems, or a lesser role/culpability. *Tyler*, 723 So.2d at 949-950.

Bobby Hampton, in addition to the capital armed robbery murder, had an extensive history of violent felony convictions and arrests, including for armed robbery, aggravated assault and attempted second degree murder. His mitigation was limited to the murder of his father, being a school drop out and church attendance, a far cry from the multiple statutory and non-statutory mitigation in Ms. Holmes' case. *Hampton,* 750 So.2d at 888-891.

Cedric Edwards who likewise was convicted and sentenced to death for a home invasion robbery involving harm to more than one person, also had a prior manslaughter conviction. Mitigating evidence in the record included alcohol and drug abuse, a learning disorder, and artistic talents, but the record does not indicate that as in Ms. Holmes case, he

endured any serious mental disorder, borderline mental retardation, brain damage, brain dysfunction, or an abusive childhood or had lesser culpability. *Edwards,* 750 So.2d at 912-915.

Daniel Irish's robbery murder was mitigated only by evidence of a dysfunctional upbringing; there was no suggestion of mental illness, low intellect, learning disorder, cognitive deficits, substance abuse problems, or that he had a lesser role in the crime. *Irish,* 807 So.2d at 215-217.

In *none* of these death cases was there doubt as to the primary role that the defendant played in the crime. Except in Bobby Hampton's case there was no question that the defendant was the shooter. Even in Hampton this Court found he was the ring leader, and there was certainly no evidence in the record that he was dominated or influenced by an abusive, stronger, violent man. In contrast that is a factor that appears time and again in the life cases, as it does in Ms Holmes case. Corey Williams and Aaron Wilson's cases were remanded by this Court under *Atkins v. Virginia* and *Simmons* respectively; mental retardation and youth alone rendered death inappropriate in these cases *regardless* of the heinousness of the crime. In fact in both cases there were questions concerning the defendant's role in the crime and their manipulation by others (in *Williams* the co-defendant was the ring-leader for the robbery and put the gun in Williams' hands; in *Wilson* the identify of the shooter was disputed by *Wilson* who although having confessed to being the shooter, later gave evidence

that he false confessed being in fear of reprisals from the real shooter. This underscores the heavily mitigating nature of their disabilities arising from an undeveloped or impaired brain limiting capacity by reason of youth or and mental retardation, and the vulnerabilities they face in the justice system as a result.

D. The mitigation presented in Ms. Holmes' case more closely resembles mitigation in cases resulting in a life sentence, even when the heinousness of the crime is taken into account

Almost all of the cases where a life sentence was returned in armed robbery murders in Caddo Parish, contained the very mitigating circumstances present in Ms. Holmes' case. The most common mitigation themes identified in the life cases are that there was some doubt as to the role or culpability of the defendant, whether because of the possibility another perpetrator was more culpable (*Washington, Brown, Webb*), or there were questions about specific intent (*Calhoon, Haynes*); the defendant's mental illness Washington, (diminished mental capacity); *Birdsong Jr* (mental illness); substance abuse/intoxication; *Calhoon* (drug and alcohol use) *Gay* (intoxication and drug addiction); or the defendants borderline intelligence *Tolbert* (borderline intelligence), Brandy Holmes case included all of these factors and *any many more.*

Neither can the life cases be distinguished because the crimes were less aggravated; on the contrary, they include cold-blooded and heinous crimes; *Donaldson* (home invasion robbery of 80 year old woman, in the course of aggravated burglary, the victim was stabbed); *Nicholson* (victim stabbed 39 times); *Birdsong Jr.* (shot victim in cooler and again to make sure he was dead); *Brown* (car-jacking, aggravated kidnapping robbery, stabbed 35 times, nearly decapitated, body disposed in pond and car burned); *Turner* (robbery murder, killing one and leaving another paralyzed); *Haynes* (robbery, rape, and stabbing of LSU student who was pushed to her death off a building); *Tolbert* (shooting which killed one and left another paraplegic who died a year after trial); *Webb* (tortured and stabbed victim who gave defendant a ride);

This Court's own precedent confirms that Brandy Holmes' death sentence is disproportionate. *State v. Sonnier*, 380 So. 2d 1 (La. 1979) was a robbery murder, involving *six* aggravating circumstances; the Court held that the death sentence was excessive because of the overwhelming amount of mitigation in the record of that case. It found that the mitigating circumstances of youth, an excitable disposition, little education, acting under the influence of an older brother, and a smaller role in the crime sufficiently established the case against death and rendered the sentence of death unconstitutionally excessive. *Id.* at 8-9. In Holmes' the crime is less heinous, there are

fewer aggravating circumstances and wealth more mitigating evidence.

As in *Sonnier* "imposition of the death penalty in this case but not in the other cases suggests that the penalty is being applied in the "freakish" and "wanton." manner reprobated by the United States Supreme Court in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Therefore, under this test, the penalty is excessive within the meaning of Article 905.9 of the Code of Criminal Procedure." Her death sentence is unconstitutionally excessive, and should be reversed.

E. The death penalty is excessive for a woman with the mitigating circumstances in Ms. Holmes' case

The death sentence in this case is also excessive and disproportionate as applied to Ms. Holmes because she is a woman who committed the crime under the influence and domination of an abusive man. There is a wide societal consensus against executing women. As Justice Marshall noted in *Furman v. Georgia*, 408 U.S. 238, 295 (1972), "[t]here is . . . overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate." *Furman*, 408 U.S. at 365. Recent research and studies continue to confirm that women are rarely sentenced to death, and that actors at all levels of the judicial system are reluctant to

criminalize, prosecute and sentence women at the capital level. *See, e.g.*, Janice L. Kopek, *Avoiding a Death Sentence in the American Legal System: Get a Woman to Do It*, 15 Cap. Def. J. 353 (2003);[23] Andrea Shapiro, *Unequal Before The Law: Men, Women And The Death Penalty*, 8 Am. U.J. Gender Soc. Pol'y & L. 427 (2000); Victor L. Streib, *Women As Perpetrators*

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[23] "About 20,000 executions have taken place in the United States during the last four centuries; of these, only 562 involved female defendants. Even when the death penalty was a much more common punishment, women faced it less often and for fewer crimes than men. In early America, men were executed for stealing, but women were almost exclusively executed for homicide or witchcraft. Forty-seven percent of the total number of American women who have been executed were African-American, and a large portion of these women were slaves executed in the eighteenth and nineteenth centuries. Traditionally, society shields women from harsher penalties in much the same way that it exempts them from military danger. The notions of chivalry loom large when considering the life and death of a woman, and these notions have not faded in the modern era. As capital punishment entered the twentieth century, the incidents of female executions decreased even further. Only one woman in the twentieth century was executed for any crime other than homicide, whereas men were executed for other crimes until mid-century. Thousands of men have been executed in the last one hundred years, but only forty-nine women have suffered the same fate. In the modern era of the death penalty, 1976 until the present day, this disparity has continued; only ten women have been executed compared with 829 men. Currently, women commit about one in every eight homicides, but they are represented in less than one in every eighty executions. This fact illustrates that men are not simply more violent and therefore executed with greater frequency; even when women do act violently they disproportionately avoid execution." 15 Cap. Def. J. 353, 354.

Of Crime: Rare And Inconsistent: The Death Penalty For Women, 33 Fordham Urb. L.J. 609 (2006).

The consensus against executing women, clearly applies throughout Louisiana in general and in Caddo Parish in particular; only three women have been put to death in Louisiana in the past one hundred years, all of them prior to 1976: Ada LeBoeuf in 1929, Julia Moore (aka Powers, Williams) in 1935, and Toni Jo Henry in 1942. Catherine Dodds was also sentenced to death, but her sentence was reversed in 1976. No female has been sentenced to death in Caddo parish in the modern death penalty era; and only one other woman has received a death sentence in the entire state (Antoinette Frank, sentenced to death in 1995); none have been executed. Given the clear consensus against executing female offenders, Ms. Holmes death sentence violates the Eighth Amendment prohibition against cruel and unusual punishment, and Louisiana's constitutional prohibition against cruel, excessive and unusual punishment under Louisiana Constitution, Art 1, § 20.

In addition, given the clear gender disparity in the application of the death penalty, a fair proportionality review entailing a comparison to "similar cases" must include a comparison to other *female* capital defendants. There is no question that the mitigation in Ms. Holmes' case far outweighs that in Antoinette Frank's case. The Court noted that the defense at *Frank's* trial argued in mitigation that defendant had no significant criminal history; that the offense was committed while defendant was under the influence

of extreme mental or emotional distress; that the defendant was a young offender under the influence or domination of another; and that she was a principal whose participation was relatively minor. However, at most the review in *Frank* reveals possible physical, sexual and emotional abuse, a possible diagnosis of PTSD, and possible negative consequences of having been raised by a mentally ill parent. Notably these factors were identified as only potential mitigators in the dissenting opinion on an *Ake* claim; no mitigating factors whatsoever are identified in the proportionality review. *State v. Frank* 1999-0553 (La. 05/22/07); 957 So. 2d 724, 746-757. There is certainly no suggestion of psychosis, brain damage, learning disability, fetal alcohol syndrome, substance dependency, or low intelligence/ borderline retardation. Moreover, *Frank's* crime was more aggravated; she was convicted of *three* counts of first degree murder and received *three* death sentences, for the execution killing of a police officer and two restaurant workers in the course of an armed robbery, exploiting her position and violating her oath as a police officer in committing the crime.

Even if death is not per se excessive and disproportionate simply because Ms. Holmes is a woman, it certainly is so when it involves a murder committed under the domination of an abusive man. The record in Ms. Holmes' case supports that she was under the influence of Robert Coleman, her domineering, violent and abusive boyfriend, during the commission of the crime. *See supra*, at 12. The law has repeatedly

been asked to recognize that under such circumstances, women should be treated more leniently:

> Women who have been battered by their husbands, lovers, and companions understandably have received an outpouring of concern. The criminal justice system has been encouraged to protect these women more completely and to punish their batterers more aggressively. When the system fails and these women kill their batterers or others, law is asked to stretch and bend to allow expanded defense theories ranging in effect from reducing the seriousness of the crime to complete exoneration.

Victor L. Streib, *Symposium: Death Penalty for Battered Women*, 20 Fl St. U.L. Rev. 163 (1992). When the ultimate penalty is at stake, women should be exempted from death altogether. *Id.* at 190-91.

Ms Holmes' death sentence is excessive, disproportionate, and must be reversed.

VI. MS. HOLMES DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE, AND ARBITRARY FACTORS

The jury's deliberations in the penalty phase were infected by a mass of legally irrelevant, improperly admitted and highly prejudicial evidence.

The prosecution introduced excessive amounts of victim impact evidence which far exceeded the

permissible limits set out by this court in *State v. Bernard*, 608 So. 2d 966 (La. 1992). The victim's daughters narrated extremely detailed information about the life of the victim, Julian Brandon, including improper victim worth evidence concerning his status and good works in the community as a Baptist minister. The state also presented victim impact evidence concerning the effects on the attack on Ms. Brandon, economic harm, victim impact of the homicide of Terrance Blaze; none of which are authorized by the sentencing statutes or legally relevant. The testimony and evidence concerning Alice Brandon were particularly graphic, detailed and prejudicial; the state presented a video tape of a day in the life of Alice Brandon, depicting her struggling to breathe, talk, and function in daily life. Her daughter's testimony provided a detailed accompanying narrative. Counsel is aware of no other capital case in this state in which anything like this amount of victim impact evidence was been admitted, stripping *Bernard* of any meaning if it is upheld.

In addition the state was permitted to present a wealth of prejudicial and inadmissible "other crimes" evidence. In its case in chief the state presented evidence of the unadjudicated homicide of Terrance Blaze, and the attempted murder of Patricia Camp. As in the Brandon homicide, the only evidence of Brandy Holmes' involvement in Terrance Blaze's homicide was her unreliable contradictory statements and the only physical evidence linking anyone to the shooting, implicated Robert Coleman. In respect of

the Patricia Camp incident there was little evidence of criminal wrong doing at all and absolutely no evidence of a violent felony. the only type of crime admissible under *Jackson*.

The State continued to present prejudicial other crimes evidence during the defense case. The prosecution improperly elicited inadmissible, unreliable, uncorroborated evidence of numerous bad acts allegedly committed by Brandy Holmes including her participation in drive by shootings and other gang-related activity, that she killed a kitten, assaulted guards, attempted to escape and committed numerous burglaries. This evidence was elicited by the state under the guise of cross-examining defense expert, Dr. Vigen concerning the contents of Brandy Holmes' juvenile records. However, those records were entirely irrelevant to his opinion concerning the results of the pretrial neuro-psychological testing he had performed for the defense, the sole reason for which he was called to testify. Many incidents the prosecution cited Dr. Vigen did not recall at all, and others the State didn't even bother to find out.

More importantly, that evidence was prohibited by *State v. Jackson*, 608 So. 2d 949, (La. 1992). The evidence violated *Jackson* (and the constitutional rights *Jackson* protects) either because it was not serious enough (non-violent, or not a felony) and was therefore legally irrelevant, or it was unsupported by evidence. Indeed a close review of the juvenile records shows that the most prejudicial evidence (including the drive by shootings and cruelty to animals), came

from entirely uncorroborated self-reports made by Brandy Holmes to psychologists in juvenile institutions, when it was well known that Brandy confabulated, exaggerated and frequently confessed to things that never occurred or reported things that never happened.[24] Yet the jury never knew this; the state selectively recited the most prejudicial sounding parts of the records, regardless of their true worth in order to inflame the jury and obtain a death sentence.

The details of the victim impact and "other crimes" evidence, the problems surrounding its admission into evidence, and the state's improper arguments concerning them, are laid out more fully at Claims VIII, IX, XII and XV of *Appellant's Brief*.

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[24] Her juvenile records demonstrate her long history of confabulating. A 1998 record shows: "she claimed that when she was 9 years old, her brother was initiating her into a gang and picked out a house in which she was to go into the house and shoot everyone in it. She reported that she shot and killed two adult males in the house but left a woman and a baby alive. She was never charged with this crime." *Id.* at 2099. At various time she has also reported: that she shot her Uncle in the leg at the age of nine, R. 2348, CD of Juvenile Records at 2849-56, that she shot her step-father with an Uzi, *id.* At 260-62, that she was convicted of first-degree murder at age nine in California where she was incarcerated but escaped and went to live with her mother in Shreveport. *Id.* at 2845. The records show Brandy Holmes had also lied to a counselor about several things such as her sister being shot and her grandmother's home being shot up during a drive by shooting, *id.* at 340, that she falsely reported having a brother named Steven Smith who was killed in a shooting. *Id.* at 1251. Ms. Holmes mother reported that after she remarried Brandy began to "make up elaborate stories and lie frequently." *Id.* at 33-45.

As well as injecting prejudicial evidence *into* the case the state also impermissibly interfered with the jurors' proper consideration of constitutionally relevant evidence in mitigation. Their misconduct included: arguing that jurors should not consider Ms. Holmes mental impairments resulting from fetal alcohol syndrome, as mitigating, R.6212, 6217; arguing that the only mitigating evidence presented by the defense was fetal alcohol syndrome, R. 6213; arguing that the defense's presentation of mitigation evidence and argument was an improper attempt to incite a verdict based on irrational emotional grounds, in violation of the law, R. 6231; arguing that evidence wasn't mitigating unless it "excused" the crime, R.6211-6212, 6215, 6233; arguing that mental health evidence was not mitigating unless it reached the level of insanity, R. 621); arguing that the heinousness of the offense required an automatic death sentence, R.5908; and arguing that the rape and sexual abuse of Ms. Holmes when she was twelve was not mitigating because it was "consensual" R.6234. *See, Ward v. Whitley*, 21 F.3d 1355, 1364 (5th Cir. 1994) (prosecutor may not argue that statutory mitigating factor should not be considered or is not mitigating), *cert. denied*, 513 U.S. 1192 (1995).

In addition state's misconduct at the guilt/innocence phase of her trial prejudiced the juror's penalty phase deliberations, injecting further arbitrary factors into their determination of sentence. The state: repeatedly showed prejudicial, graphic crime scene

and autopsy photos and crime scene video to the jury, often-times projecting them on the wall to inflame the jury even more, R.5355, 5769, 5370-5374 5374, 5424-5425, 5527-5528, 5627-5629, 5643-5647, 5724-5737, 5749-5763, 5778-5779; argued about the details of the crime and the Brandons' injuries in graphic and inflammatory ways, R. 5301-5304, 5778-5779, 5783-5784, 5787; and repeatedly questioned numerous witnesses about such details, R. 5356-5358, 5362-5365, 5370-5397, 5529-5235, 5629-5637, 5643-5647, 5724-5737, 5749-5763; argued about Ms. Holmes character and motivations in a speculative, inflammatory ways, R.5304-5305, 5313, 5336, 5779-5781, 5784-5786; and argued that the defense concession to second degree murder removed the jury's option to return a verdict of lesser included offenses. R.5769.

Individually and collectively this evidence and misconduct injected arbitrary and prejudicial factors into the jury's deliberations and as a consequence "the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors", in violation of Ms. Holmes federal and state constitutional rights. Ms. Holmes death sentence should be reversed.

VII. THE DEATH PENALTY IMPOSED IN THIS CASE IS ITSELF AN UNCONSTITUTIONALLY CRUEL, UNUSUAL AND DEGRADING PUNISHMENT

Ms. Holmes was sentenced to death "by lethal injection."[25] Louisiana's lethal injection procedures are unconstitutional and violate both the Eighth Amendment's proscription against cruel and unusual punishment, and the prohibition in Article I, Section 20 of the Louisiana Constitution, against cruel, unusual or excessive punishment, and euthanasia. The three-chemical cocktail used in lethal injection may fail to sufficiently anesthetize the recipient and at the same time paralyze and prevent the recipient from alerting the authorities to take remedial action. In addition the procedures and protocols otherwise provide inadequate safeguards against mistakes and malfunctioning of equipment; inadequate monitoring of the defendant's physical condition, and thereby result in unnecessary pain and suffering and/or an unreasonable risk of such occurring. A punishment is particularly constitutionally offensive if it involves the foreseeable infliction of suffering. *Furman v. Georgia*, 408 U.S. 238, 273 (1973), *citing Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (had failed execution been intentional and not unforeseen, punishment would have been, like torture, "so degrading and indecent as to amount to a refusal to accord the criminal human status").

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[25] [I]t will be the sentence of the Court, in accordance with recommendation of the jury, that Ms. Holmes be sentenced to death by lethal injection." R. 6270-6271.

Both due process and Louisiana's sentencing statute require that Ms. Holmes be sentenced within a reasonable time to a constitutional punishment. La. C Cr Pr. Art 874 provides: "Sentence *shall* be imposed without unreasonable delay" (emphasis added). This Court should set aside her sentence of death and enter the only constitutional sentence: life.[26]

Respectfully Submitted,

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[26] La. C.Cr.P Art 882(A) clearly gives this Court the authority to correct an illegal sentence "An illegal sentence may be reviewed as to its legality on the application of the defendant or of the state; (1) In an appealable case by appeal". *And see*; La.C.Cr.P Art 874 which provides "If a defendant claims that the sentence has been unreasonably delayed, he may invoke the supervisory jurisdiction of the appellate court."

CERTIFICATE OF SERVICE

I hereby certify that this document was sent by first class mail, postage pre-paid, on this 25th day of February, 2008, upon

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Supreme Court, U.S.
FILED
JUN 15 2009
OFFICE OF THE CLERK

No. 08-1358

IN THE

Supreme Court of the United States

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

BRIEF IN REPLY TO OPPOSITION

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462 U.S. 880 (1983) 2

BRIEF IN REPLY

1. The *Opposition Brief* suggests that the Court should not grant certiorari because *Pulley v. Harris*, 465 U.S. 37 (1984), provided a once-and-for-all answer to the question of whether the federal constitution compels proportionality review. This is not the case. *Pulley* assessed one state's sentencing scheme at one point in time. 465 U.S. at 45 ("We take statutes as we find them."); *id.* at 51 (assuming that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review," but finding that "the 1977 California statute is not of that sort"). A state's sentencing scheme can be, as Louisiana's scheme is, insufficiently calibrated to prevent arbitrary death sentences. In these circumstances, *Pulley* informs, but does not control. The absence of controlling precedent drives the question presented here: whether proportionality review is required where a state scheme contains insufficient internal checks to guard against the arbitrary imposition of the death penalty.

2. Louisiana does not contest that Justice Stevens' statement concerning the denial of certiorari in *Walker v. Georgia*, 129 S.Ct. 453 (2008), states that the arbitrary imposition of the death penalty would be the "likely result" of insufficient proportionality review. Instead, Louisiana counters on the merits, siding with Justice Thomas' concurrence in *Walker*, which suggests that though states may elect to afford capital defendants the extra protections associated with proportionality

review, the federal constitution does not compel such review in any form. Opp. Br. at 13. Thus, the State's suggestion that the Eighth Amendment never requires proportionality review is a proposition debated not only throughout the landscape of state cases identified by *amici*[1] -- *see e.g.*, *Brief of The Constitution Project* and *Brief of the Louisiana Association of Criminal Defense Lawyers* -- but also reflected in a deep divide within the Court. This is a reason to grant, not deny, certiorari.

3. The *Opposition Brief* also identifies another important reason for the Court to intervene: to evaluate what type of proportionality review suffices to cure an otherwise deficient capital sentencing scheme. The State suggests that comparison with other cases where a death sentence is imposed suffices to establish that a death sentence is not arbitrarily imposed. Petitioner disagrees. *Cf. Zant v. Stephens*, 462 U.S. 880 n.19 (1983) (noting approvingly that Georgia's proportionality review compares "not only similar cases in which death was imposed, but similar cases in which death was not imposed."). This disagreement is also reflected in the varying views of states throughout the country. *See Holmes v. Louisiana, Brief of The Constitution Project* at 7-8, at n.5, and Appendix I, conditionally filed 6/4/2009 (noting that nineteen states require different types of proportionality review); *see also id.*

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[1] Respondent refused to consent to the filing of any Amicus Briefs in this case, and as such, each identified *amici* filed a *Motion for Leave to File Amicus Brief*, along with a conditionally filed Amicus Brief, to which Petitioner refers.

at 10, (noting reversals of death sentences based upon meaningful comparative appellate review). *See also Holmes v. Louisiana, Brief of The Louisiana Association of Criminal Defense Lawyers*, at 13-14, and Appendix B, conditionally filed 6/4/2009 (noting, since *Pulley*, the "widespread failure of state appellate courts" to fully consider "mitigating circumstances."). Certiorari is warranted to provide the states with guidance as to what type of proportionality review the Eighth Amendment requires where other statutory controls are insufficient to prevent the arbitrary imposition of the death penalty.

4. Petitioner's claim is that her death sentence is excessive and arbitrary, and that the Louisiana Supreme Court's failure to conduct an adequate proportionality review violates the Eighth Amendment. The State's position that this issue is not properly before the Court is simply breathtaking. Petitioner has taken every available opportunity to raise this claim, and has even gone as far as to suggest the manner in which a sufficient excessiveness review should be conducted. *Defense Opposition to Factual Contents of Uniform Capital Sentence Report and Capital Sentence Investigation Report, filed 03/16/07, at 1-2; Appellant's Capital Sentence Review Memorandum, filed 02/25/08,* located in *State Opposition, Appendix 2, at 86-87, 123-24, 133, 142; Application for Rehearing, filed 12/16/08, at 5-6.* The *Opposition Brief* mistakes Petitioner's discussion of the elements of Louisiana's capital sentencing scheme for independent

constitutional claims. Opp. Br. at 13-19.[2] Petitioner has identified a number of facets to Louisiana's sentencing scheme – a lack of internal controls, an ever-expanding universe of aggravating factors, a lack of any standard for determining which death-eligible defendants should be sentenced to death, and the broad expansion of the range of evidence admissible at the penalty phase – in order to demonstrate that proportionality review in Louisiana is a necessary component to a

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[2] The State also takes umbrage with several of Petitioner's factual representations. Opp. Br. at 9-12. But the record could not be clearer. Evidence that Ms. Holmes suffered from FAS was uncontested. *See* R. 6138 (Dr. Williams: "I think under axis III that she has brain damage and brain dysfunction as a result of fetal alcohol syndrome."); R. 6199 (Defense: "Let's get this straight. I didn't retain you to make a final diagnosis of fetal alcohol syndrome or anything like that, correct?" Dr. Patterson: "Correct."); *see also* Pet. at 27 n.12. Indeed, while the *State's Brief* now makes the claim that "it was not proven by a preponderance of the evidence that petitioner . . . has FAS", Opp. Br. at 22, in closing arguments to the jury the prosecutor accepted that the issue was uncontested: "I've already told you that our position is that she *does* suffer some of the effects of Fetal Alcohol Syndrome. . . . But no doctor . . . ever came in here and said she didn't have her own free choice." R. 6237. In any event, the State's argument is premature. The gravamen of petitioner's constitutional claim is that the Louisiana Supreme Court did not address these issues at all. Regardless of which set of facts the Louisiana Supreme Court ultimately would credit, the issue here is whether that court's decision not to address the relative culpability of the co-defendant and the comparative weight of Petitioner's mitigating evidence is of constitutional moment.

constitutional capital punishment scheme.[3] *Cf. Walker*, 129 S.Ct. 453, 457 ("And the likely result of such a truncated review—*particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors*—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.")(emphasis supplied). The issue is properly preserved and warrants this Court's review.[4]

---

[3] Petitioner's claim is carefully cabined to address the Louisiana capital sentencing scheme. The case does not address the issue of whether proportionality review is required in states that have other methods to narrow the class of offenders who receive the death penalty. See *Jurek v. Texas*, 428 U.S. 262 (1976).

[4] In any event, the Louisiana Supreme Court decided the issue. Pet. App. A. at 107a. ("[T]he federal Constitution does not require proportionality review."). This alone is enough to dismiss the State's preservation concerns. See, e.g, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF GRANT OF CERTIORARI

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MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the Constitution Project moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of *certiorari*. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has refused to consent.

Under Article 905.9 of the Louisiana Code of Criminal Procedure, the Louisiana Supreme Court must review every death sentence to determine if it is

excessive. That court's rules require it to review each death sentence for arbitrariness and to consider whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. In recent years, however, the state court has repeatedly failed to comply with that mandate. In particular, as in Ms. Holmes's case, the court has repeatedly failed to conduct an adequate proportionality review, comparing only the facts of a crime to the facts of other capital cases, while disregarding defendant's mitigating circumstances. The Louisiana Supreme Court's failure to conduct a meaningful and vigorous review of mitigation violates the Eighth Amendment to the United States Constitution.

Amicus curiae is a bipartisan non profit organization that seeks solutions to constitutional issues through scholarship and public education. Although the Constitution Project takes no position on capital punishment, it is deeply concerned with the preservation of our fundamental civil rights, including our Eighth Amendment right to be free from the arbitrary, capricious, and discriminatory imposition of the death penalty. In 2000, the Project convened a blue-ribbon committee to evaluate current procedural safeguards. The committee was comprised of a broad spectrum of individuals with extensive experience with the criminal justice system and included both supporters and opponents of capital punishment. After conducting a careful and considered evaluation of the various death penalty systems in this country, the committee concluded that there are currently insufficient protections in place to ensure fundamental fairness. Among other things, the committee

emphasized the need for states to adopt meaningful appellate review of death sentences, including adopting proportionality review mechanisms.

Amicus curiae's extensive knowledge of the appellate review procedures in place in this country and its goal of helping to ensure the protection of our civil rights gives it a strong interest in the resolution of the question raised by the petitioner in this case. Accordingly, *amicus curiae* respectfully requests leave to file the attached brief that describes in detail those appellate procedures and why the Louisiana Supreme Court's approach is inconsistent with not only its own state law scheme but also with the requirements of the Eighth Amendment.

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June 4, 2009

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IN THE
Supreme Court of the United States

No. 08-1358

BRANDY AILEEN HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

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BRIEF FOR THE CONSTITUTION PROJECT, AS *AMICUS CURIAE* IN SUPPORT OF GRANT OF CERTIORARI

Amicus curiae, the Constitution Project respectfully submits this brief in support of the petition for a writ of *certiorari.*

STATEMENT OF INTEREST

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education.[1] The Project's essential mission is to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. The Project promotes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In 2000, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system. Although the Initiative does not take a position on the death penalty, it is

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. A letter confirming Petitioner's consent to the filing of this *amicus* brief has been submitted to the Clerk. Respondent has refused to give its consent. Accordingly, *amicus* is filing concurrently herewith a motion for leave to file this brief pursuant to Rule 37.2 of the Rules of this Court.

concerned that, as currently administered, the death penalty lacks adequate procedural safeguards and other assurances of fundamental fairness. The Committee issued its first report in 2001,[2] and in 2006, issued an updated version of its report with thirty-two consensus recommendations. The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2006), *available at* http://www.constitutionproject.org/manage/file/30.pdf (last visited June 2, 2009).

Recommendation 11 and the corresponding commentary in *Mandatory Justice* describe the need for states to adopt and implement proportionality review mechanisms that will meaningfully reduce the risk of the arbitrary, capricious, and discriminatory application of the death penalty, as required by *Furman v. Georgia*, 408 U.S. 238 (1972). *Mandatory Justice* at 39-41. The Louisiana Supreme Court's failure in this case and in others to conduct meaningful appellate review of death sentences is in direct contravention of this recommendation and poses an impermissible risk that the death penalty is being administered in violation of the Eighth Amendment. The Constitution Project therefore urges that the petition for *certiorari* be granted.

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[2] The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001), *available at* http://www.constitutionproject.org/manage/file/31.pdf (last visited June 2, 2009).

SUMMARY OF THE ARGUMENT

Appellate review of mitigation serves as a necessary check against the arbitrary and capricious imposition of the death penalty as prohibited by the Eighth Amendment to the United States Constitution. Today, the majority of death penalty schemes either authorizes comparative proportionality review or provides for an alternative vehicle to ensure meaningful appellate review of mitigation. Although the State of Louisiana's capital punishment scheme contains provisions purporting to require appellate comparative proportionality review and review for arbitrariness, in the case of Brandy Aileen Holmes — as in other recent Louisiana capital cases —the Louisiana Supreme Court failed to conduct such a review or give any consideration to her mitigating circumstances before affirming her death sentence.

The court's failure was not for a lack of compelling mitigation evidence. Born with Fetal Alcohol Syndrome ("FAS"), Ms. Holmes spent the majority of her teen and young adult years institutionalized. In addition to FAS, she suffers from organic brain damage, borderline mental retardation, Post-Traumatic Stress Disorder, and chronic and severe depression. Her chaotic childhood was marked by physical and sexual violence as well as poverty and neglect. At the age of twenty-six, Ms. Holmes entered into an abusive relationship with her co-defendant, an older man who controlled her and whom the State argued was the likely triggerman.

The important question of law raised by the Louisiana Supreme Court's limited review of Ms. Holmes's death sentence is whether meaningful appellate review of such powerful mitigation is constitutionally required by the Eighth Amendment.

For these reasons, *amicus curiae* urges the Court to grant the Petition for *certiorari*.

ARGUMENT

I. MEANINGFUL APPELLATE REVIEW OF MITIGATION IS REQUIRED TO GUARD AGAINST THE ARBITRARY AND CAPRICIOUS ADMINISTRATION OF THE DEATH PENALTY.

Beginning with *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has consistently affirmed that meaningful appellate review is a necessary component of a constitutional death penalty scheme.[3] The Court

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[3] *See Gregg*, 428 U.S. at 195, 206 (upholding Georgia's death penalty statute in significant part because of its appellate review provisions); *Proffitt v. Florida*, 428 U.S. 242, 251-53 (1976) (upholding Florida's statute in significant part because its appellate review provisions require a substantive and comparative consideration of all cases); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (upholding Texas's statute after concluding that its appellate review provisions provide a "means to promote the evenhanded, rational, and consistent imposition of death sentences under law"); *Zant v. Stephens*, 462 U.S. 862, 890 (1983) (upholding a Georgia death sentence because of, *inter alia*, the "existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality"); *Parker v.*

has been equally as clear that the Eighth Amendment requires robust consideration and weighing of mitigating evidence. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (striking North Carolina's mandatory death scheme because, *inter alia*, it "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors" and holding that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender"); *Tennard v. Dretke*, 542 U.S. 274, 278 (2004) (noting that the Eighth Amendment requires that the sentencer is able to "consider and give effect" to mitigating evidence); *Abdu-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("[O]ur cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating

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Dugger, 498 U.S. 308, 321 (1991) (stressing the "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally"); *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) ("[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency."); *McKoy v. North Carolina*, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) ("Moreover, by enabling the reviewing court to examine the specific findings underlying the verdict it facilitates appellate review, which we have described as 'an important additional safeguard against arbitrariness and caprice." (citation omitted)); *see also Walker v. Georgia*, 129 S. Ct. 453, 454 (2008) (Stevens, J., statement respecting the denial of *certiorari*) (explaining that the decision in *Gregg* to uphold the Georgia statue "was founded on an understanding that the new procedures the statute prescribed would protect against the imposition of death sentences influenced by impermissible factors," and citing appellate proportionality review as one of those critical procedures).

evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future").

In two cases, *Parker v. Dugger*, 498 U.S. 308 (1991) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court has explicitly acknowledged the importance of appellate review of mitigation. In *Parker*, the Court reversed defendant's death sentence because the Florida Supreme Court had failed to conduct an independent review of the trial court's imposition of the death penalty, and had failed to consider and weigh the evidence presented at trial of non-statutory mitigating circumstances. *Parker*, 498 U.S. at 321-22. In *Eddings*, the Court similarly vacated defendant's death sentence because *both* the sentencing trial judge and the reviewing Oklahoma Court of Criminal Appeals[4] had failed to consider and give weight to defendant's evidence of mitigation. *Eddings*, 455 U.S. at 114-115 ("The sentencer, and the *Court of Criminal Appeals on review*, may determine the weight to be given relevant mitigating evidence, [b]ut they *may not give it no weight by excluding such evidence from their consideration.*") (emphasis added).

Of the thirty-five states that authorize the death penalty today, the majority, nineteen, require comparative proportionality review, as does the

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[4] The Oklahoma Court of Criminal Appeals reviewed the defendant's death sentence in connection with its consideration of appellant's claim that his death sentence was excessive in light of mitigating factors. *Eddings*, 455 U.S. at 113 n.9.

military law.[5] *See* Appendix I, Death Penalty Appellate Review Procedures. As the Court observed in examining Georgia's approach in the early 1970s, the collective experience of those jurisdictions is that a comparative proportionality review can be an effective method of preventing the infliction of arbitrary death sentences. *Gregg*, 428 U.S. at 205 (describing reversals by the Georgia Supreme Court and concluding that the court "has taken its review responsibilities seriously" with respect to proportionality review, thereby reducing the risk of the arbitrary infliction of the death penalty). In the years since *Gregg*, a number of courts have used comparative

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[5] Proportionality review is required by statute or case law in the following states: Alabama, Ala. Code §13A-5-53(b)(3) (enacted 1981); Delaware, Del. Code Ann. Title 11 §4209(g)(2)(a); Florida, by case law, *see, e.g.*, *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995); Georgia, Ga. Code Ann. §17-10-35(c)(3) (enacted 1973); Kentucky, Ky. Rev. Stat. Ann. §532.075(3)(c) (enacted 1976); Louisiana, La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (enacted 1977); Mississippi, Miss. Code Ann. §99-1-105(3)(c) (enacted 1977); Missouri, Mo. Ann. Stat. §565.035(3)(3) (enacted 1983); Montana, Mont. Code Ann. §46-18-310(1)(c) (enacted 1977); Nebraska, Neb. Rev. Stat. §29-2521.03 (enacted 1978); New Hampshire, N.H. Rev. Stat. Ann. § 630:5(XI)(c) (enacted 1986); North Carolina, N.C. Gen. Stat. §15A-2000(d)(2) (enacted 1977); Ohio Rev. Code Ann. §2929.05(A) (enacted 1981); South Carolina, S.C. Code Ann. §16-3-25(C)(3) (enacted 1977); South Dakota, S.D. Codified Laws §23A-27A-12(3) (enacted 1979); Tennessee, Tenn. Code Ann. §39-13-206(c)(1)(D) (enacted 1992); Utah, by case law, *see, e.g.*, *State v. Lafferty*, 20 P.3d 342 (Utah 2001); Virginia, Va. Code § 17.1-313(C)(2) (enacted 1998); Washington, Wash. Rev. Code Ann. §10.95.130(2)(b) (enacted 1981). Death sentences imposed under the Uniform Code of Military Justice must also be reviewed using a comparative proportionality analysis. *See United States v. Curtis*, 32 M.J. 252, 270-271 (C.M.A. 1991) .

proportionality review to set aside arbitrary death sentences.[6]

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[6] *Henry v. State*, 647 S.W.2d 419, 488 (Ark. 1983); *Sumlin v. State*, 617 S.W.2d 372, 375 (Ark. 1981); *State v. Fierro*, 804 P.2d 72, 90 (Ariz. 1990); *Hall v. State*, 244 S.E.2d 833, 839 (Ga. 1978); *Ward v. State*, 236 S.E.2d 365, 368 (Ga. 1977); *Allen v. State*, 636 So. 2d 494, 497-98 (Fla. 1994); *Amoros v. State*, 531 So. 2d 1256, 1261 (Fla. 1988); *Besaraba v. State*, 656 So. 2d 441, 447 (Fla. 1995); *Blair v. State*, 406 So. 2d 1103, 1109 (Fla. 1981); *Blakely v. State*, 561 So. 2d 560, 561 (Fla. 1990); *Caruthers v. State*, 465 So. 2d 496, 498-99 (Fla. 1985); *Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995); *Clark v. State*, 609 So. 2d 513, 516 (Fla. 1992); *DeAngelo v. State*, 616 So. 2d 440, 443-44 (Fla. 1993); *Farinas v. State*, 569 So. 2d 425, 431-32 (Fla. 1990); *Garron v. State*, 528 So. 2d 353, 361 (Fla. 1988); *Hazen v. State*, 700 So. 2d 1207, 1214-15 (Fla. 1997); *Herzog v. State*, 439 So. 2d 1372, 1381 (Fla. 1983); *Johnson v. State*, 720 So. 2d 232, 238-39 (Fla. 1998); *Jones v. State*, 963 So. 2d 180, 187 (Fla. 2007); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991); *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993); *Kramer v. State*, 619 So. 2d 274, 278 (Fla. 1993); *Livingston v. State*, 565 So. 2d 1288,1292 (Fla. 1988); *Lloyd v. State*, 524 So. 2d 396, 403 (Fla. 1988); *McCaskill v. State*, 344 So. 2d 1276, 1280 (Fla. 1977); *McKinney v. State*, 579 So. 2d 80, 85 (Fla. 1991); *Morgan v. State*, 639 So. 2d 6, 13-14 (Fla. 1994); *Nibert v. State*, 574 So. 2d 1059, 1062-63 (Fla. 1990); *Penn v. State*, 574 So. 2d 1079, 1083-84 (Fla. 1991); *Proffitt v. State*, 510 So. 2d 896, 898 (Fla. 1987); *Puccio v. State*, 701 So. 2d 858, 863 (Fla. 1997); *Rembert v. State*, 445 So. 2d 337, 340-41 (Fla. 1984); *Robertson v. State* 699 So. 2d 1343, 1347 (Fla. 1997); *Ross v. State*, 474 So. 2d 1170, 1174 (Fla. 1985); *Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994); *Slater v. State*, 316 So. 2d 539, 542-43 (Fla. 1975); *Smalley v. State*, 546 So. 2d 720, 723 (Fla. 1989); *Songer v. State*, 544 So. 2d 1010, 1011-12 (Fla. 1989); *Tillman v. State*, 591 So. 2d 167, 169 (Fla. 1991); *Terry v. State*, 668 So. 2d 954, 965-66 (Fla. 1996); *White v. State*, 616 So. 2d 21, 25-26 (Fla. 1993); *Williams v. State*, 707 So. 2d 683, 686 (Fla. 1998); *Wilson v. State*, 493 So. 2d 1019, 1023-24 (Fla. 1986); *Woods v. State*, 733 So. 2d 980, 991-92 (Fla. 1999); *State v. Pratt*, 873 P.2d 800, 823-25 (Idaho

Many of those reversals resulted from the consideration given to mitigation by the appellate courts during their comparative review analysis. *See, e.g., State v. Thompson,* No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *33-36 (Tenn. Crim. App. April 25, 2007) (reversing death sentence of a defendant with a "long and documented history of mental illness" after conducting a comparative review of all cases involving similar defendants and similar crimes); *State v. Kemmerlin*, 573 S.E.2d 870, 897-99 (N.C. 2002) (setting aside death sentence as disproportionate given

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1993); *State v. Scroggins,* 716 P.2d 1152, 1158-61 (Idaho 1985); *State v. Windsor,* 716 P.2d 1182, 1192-95 (Idaho 1985); *People v. Buggs,* 493 N.E.2d 332, 336-37 (Ill. 1986); *People v. Carlson,* 404 N.E.2d 233, 244-45 (Ill. 1980); *People v. Gleckler,* 411 N.E.2d 849, 861 (Ill. 1980); *People v. Johnson,* 538 N.E.2d 1118, 1130-31 (Ill. 1980); *Biondi v. State,* 699 P.2d 1062, 1066-67 (Nev. 1985); *Harvey v. State,* 682 P.2d 1384, 1385-87 (Nev. 1984); *Haynes v. State,* 739 P.2d 497, 503-04 (Nev. 1987); *State v. Sonnier,* 380 So. 2d 1, 7-9 (La. 1979); *Coleman v. State,* 378 So. 2d 640, 649-50 (Miss. 1979); *Edwards v. State,* 441 So. 2d 84, 92-94 (Miss. 1983); *Reddix v. State,* 547 So. 2d 792, 794-95 (Miss. 1989); *Bullock v. State,* 525 So. 2d 764, 768-70 (Miss. 1987); *State v. Chaney,* 967 S.W.2d 47, 59-60 (Mo. 1998); *State v. McIlvoy,* 629 S.W.2d 333, 341-42 (Mo. 1982); *State v. Kemmerlin,* 573 S.E. 2d 870, 897-99 (N.C. 2002); *State v. Benson,* 372 S.E.2d 517, 552-23 (N.C. 1988); *State v. Bondurant,* 309 S.E.2d 170, 182-83 (N.C. 1983); *State v. Hill,* 319 S.E.2d 163, 170-72 (N.C. 1984); *State v. Jackson,* 305 S.E.2d 703, 716-18 (N.C. 1983); *State v. Rogers,* 341 S.E.2d 713, 731-33 (N.C. 1986); *State v. Stokes,* 352 S.E.2d 653, 663-68 (N.C. 1987); *State v. Young,* 325 S.E.2d 181, 192-94 (N.C. 1985); *State v. DiFrisco,* 900 A.2d 820, 832-33 (N.J. 2006); *State v. Papasavvas,* 790 A.2d 798, 804-12, 817-18 (N.J. 2002); *Munn v. State,* 658 P.2d 482, 487-88 (Okla. Crim. App. 1983); *State v. Hale,* 840 S.W.2d 307, 314-15 (Tenn. 1992); *State v. Thompson,* No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *33-36 (Tenn. Crim. App. April 25, 2007).

the totality of circumstances, including weak evidence in aggravation and the presence of six mitigating factors); *State v. Chaney*, 967 S.W.2d 47, 60 (Mo. 1998) (reversing death sentence following a comparative proportionality review based, *inter alia*, on mitigating evidence of defendant's positive character); *Klokoc v. State*, 589 So. 2d 219, 222 (Fla. 1991) (mitigating evidence, including evidence that defendant suffered from bipolar affective disorder, outweighed aggravating factors and required a life sentence); *State v. Fierro*, 804 P.2d 72, 90 (Ariz. 1990) (reducing death sentence on proportionality grounds because, *inter alia*, "considering Fierro's history of psychological illness, we believe a careful examination of his background renders him less, not more, deserving of a death sentence than the 'typical' first degree murderer"); *People v. Carlson*, 404 N.E.2d 233, 245 (Ill. 1980) (reducing penalty to life imprisonment because defendant's "mitigating circumstances do not bespeak a man with a malignant heart who must be permanently eliminated from society").[7]

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[7] Appellate courts in several states have reversed death sentences in light of many of the same mitigating factors presented by Petitioner in this case, including evidence of brain damage and mental illness, learning disabilities, childhood abuse, reduced role in the crime, and relative youth. *See Allen*, 636 So. 2d at 497-98 (young age); *Besaraba*, 656 So. 2d at 447 (no significant history of prior criminal activity, crimes were committed while defendant was under the influence of great mental or emotional disturbance, defendant's history of alcohol and drug abuse and physical and emotional problems, good character, and badly deprived and unstable childhood); *Clark*, 609 So. 2d at 516 (on review finding only one aggravating factor was applicable and concluding that non-statutory mitigation evidence of mental health disturbance, sexual and psychological abuse as child,

and substance abuse at time of crime required a life sentence); *DeAngelo*, 616 So. 2d at 443-44 ("significant mental mitigation," including evidence of bilateral brain damage, hallucinations, and delusional beliefs); *Edwards*, 441 So. 2d at 93-94 (evidence of serious mental illness); *Hall*, 244 S.E.2d at 839 (reversing where the co-defendant-triggerman, received life and defendant received death); *Harvey*, 682 P.2d at 1386 (young age, lack of prior criminal history, and extreme mental or emotional disturbance at time of the crime); *Haynes*, 739 P.2d at 503-04 (mentally ill defendant was in and out of mental institutions for four to five years leading up to the crime); *Hazen*, 700 So. 2d at 1214-15 (disposition of co-defendant's case); *Herzog*, 439 So. 2d at 1381 (disposition of co-defendants' cases); *Knowles*, 632 So. 2d at 67 (organic mental disorder and brain damage, low average intelligence, chronic memory impairment, and substance abuse); *Kramer*, 619 So. 2d at 278 (history of alcoholism, evidence of mental stress, severe loss of emotional control, and potential for productive functioning in prison); *Livingston*, 565 So. 2d at 1292 (youth, inexperience, marginal intellectual functioning, childhood history of abuse, neglect, and substance addiction); *McKinney*, 579 So. 2d at 85 (mental deficiencies and alcohol and drug history); *Morgan*, 639 So. 2d at 13-14 (youth, brain damage, drug use at the time of the crime, and borderline intelligence); *Munn*, 658 P.2d at 487-88 (mental state at time of crime); *Nibert*, 574 So. 2d at 1062-63 (Fla. 1990) (physical and psychological child abuse, remorse, and influence of alcohol at time of crime); *Carlson*, 404 N.E.2d at 245 (extreme mental or emotional disturbance and remorse); *Johnson*, 538 N.E.2d at 1131 (lack of prior criminal record, remorse, capacity for rehabilitation and good character); *Puccio*, 701 So. 2d at 863 (role in offense); *Reddix*, 547 So. 2d at 794 (youth, mild mental retardation, mild mental illness, and accomplice role in the victim's death); *Robertson*, 699 So. 2d at 1347 (youth, impaired capacity, childhood abuse, history of mental illness, and borderline intellectual functioning); *Ross*, 474 So. 2d at 1174 (history of alcoholism and alcohol use at time of crime); *Slater*, 316 So.2d at 542 (reduced culpability as accomplice); *Smalley*, 546 So. 2d at 723 ("substantial" mitigating evidence, including evidence of clinical depression); *Songer*, 544 So. 2d at 1011-12 ("significant mitigation,"

The majority of states without proportionality review and the Federal death penalty scheme have other appellate statutory mechanisms — including review for arbitrariness and review of mitigation — that permit appellate courts to reverse death sentences in light of defendant's mitigating circumstances. *See* Appendix I; *see also State v. Bocharski*, 189 P.3d 403, 426 (Ariz. 2008) (independently weighing aggravating and mitigating circumstances and reversing death sentence because of the "limited aggravation evidence and the strong mitigation evidence"); *State v. Roque*, 141 P.3d 368, 406 (Ariz. 2006) (independently weighing mitigating evidence, including evidence of defendant's mental illness and low IQ, and concluding that a life sentence should be imposed because, "taken as a whole, the mitigating evidence here raises a substantial question whether death is an appropriate sentence"); *Chambers v. State*, 944 P.2d 805, 811 (Nev. 1997)[8] (reversing death sentence after conducting an excessiveness

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including mental health evidence); *Benson*, 372 S.E.2d at 522-23 ("strong" mitigating factors, including evidence that defendant was under the influence of a mental or emotional disturbance); *Bondurant*, 309 S.E.2d at 182-83 (defendant's remorse and intoxication at time of crime); *Bullock*, 525 So. 2d at 770 (lesser role in crime); *Fierro*, 804 P.2d at 90 (history of psychological illness); *McIlvoy*, 629 S.W.2d at 341-342 (limited education and intelligence, alcohol problems, and follower rather than leader personality); *Papasavvas*, 790 A.2d at 804-11 (brain damage, child abuse, youth, and remorse); *White*, 616 So. 2d at 26 (mental health problems and drug use); *Woods*, 733 So. 2d at 991 (borderline intellectual functioning, learning disabilities, and difficult childhood).

[8] Nevada amended its statute in 1985 to require only an excessiveness review, rather than proportionality and excessiveness. 1985 Nev. Stat. 1597, § 1.

review because of a lack of aggravating factors and because of evidence that defendant was intoxicated at the time of the crime); *People v. Leger*, 597 N.E.2d 586, 612 (Ill. 1992) (reducing defendant's sentence to life under constitutional authority based on evidence of mitigation, including military and work history, medical problems, lack of criminal history, and history of alcohol abuse); *see also State v. Claytor*, 574 N.E.2d 472, 481 (Ohio 1991)[9] (reversing death sentence after independently weighing aggravating and mitigating circumstances because the "mitigating factor involving [the defendant's] undisputed mental illness and the impact it had on his reasoning process should have been accorded more weight").

II. THE LOUISIANA SUPREME COURT IS FAILING TO CONDUCT A MEANINGFUL APPELLATE REVIEW OF MITIGATING EVIDENCE.

On its face, the plain language of the Louisiana death penalty statute and the state supreme court's rules provide for both comparative proportionality review and arbitrariness review.[10] Early Louisiana

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[9] In addition to a reweighing of mitigating and aggravating circumstances, Ohio authorizes a comparative proportionality review under its statute. *See* Appendix I.

[10] Under the state scheme, the Louisiana Supreme Court is required to review every death sentence to determine, *inter alia*, whether (1) "the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors;" (2) "the evidence supports the jury's finding of a statutory aggravating circumstance"; and (3) the death sentence is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." La. Sup. Ct.

cases reflect that at the beginning of its experience with comparative proportionality review, the Louisiana Supreme Court took this charge seriously and conducted meaningful and vigorous reviews pursuant to these rules and constitutional principles. In *State v. Sonnier*, 380 So. 2d 1 (La. 1979), for example, the court set aside defendant's death sentence as excessive after comparing it to other first degree murder cases given the extensive mitigating evidence in defendant's case. *Id.* at 7-9. Similarly, in *State v. Weiland*, 505 So. 2d 702 (La. 1987), the court concluded that defendant's death sentence was disproportionate to other sentences because of the presence of a large number of mitigating circumstances. *Id.* at 709-11. In *State v. Smith*, 400 So. 2d 587 (La. 1981), the court remanded the case to the trial court for factual development and re-evaluation of an aggravating circumstance as part of its excessiveness review because of the "scrupulous appellate review" required in death cases. *Id.* at 593.

In recent years, however, the Louisiana Supreme Court has failed to comply with this mandate. *See, e.g., State v. Draughn*, 950 So. 2d 583, 635 (La. 2007) (comparing the facts and circumstance of the crime to other capital cases but ignoring mitigating evidence); *State v. Lacaze*, 824 So. 2d 1063, 1085 (La. 2002) (same); *State v. Irish*, 807 So. 2d 208, 217 (La. 2002) (same). Certainly, in petitioner's case, the Louisiana Supreme Court did not conduct anything approaching the type of proper vigorous and meaningful proportionality review it conducted in the

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Rule 28 (specifying three step inquiry); La. Code Crim. Proc. art. 905.9.

1970s and 1980s. *See* Pet. Br. at 11, 27-28. Despite the data collection procedures designed to facilitate a robust comparison of the petitioner's case with others,[11] the Louisiana Supreme Court limited its analysis to consideration and comparison only of the *facts* of petitioner's *crime* compared to the *facts* of other death-sentence *crimes*. *State v. Holmes*, 5 So. 3d 41, 86-87 (La. 2008) (listing other cases with the same aggravating factors and concluding on this basis that the death sentence was not disproportionate). In conducting its proportionality review, the Louisiana Supreme Court did not so much as cite, let alone discuss, the trial record or defendant's sentencing memorandum that set forth the extensive mitigation evidence in Ms. Holmes's case, including her mental health diagnoses of FAS and post-traumatic stress disorder, her low intelligence, the fact that she likely had a reduced role in the crime, and her chaotic childhood. *Id.*

The Louisiana Supreme Court's current practice of conducting only a limited proportionality review without weighing or giving effect to mitigation evidence violates the Eighth Amendment. As the Louisiana Supreme Court recognized itself in the early years of its analysis, appellate review of mitigating circumstances is necessary to determine if the death penalty was imposed in an arbitrary fashion.

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[11] The Louisiana State Supreme Court rules require the trial judge, prosecution, and defense counsel to submit information relevant to a proportionality review, including information about the defendant's background, family situation, education, economic and employment status as well as information about all other first-degree murder cases from the district in which the sentence was imposed. La. Sup. Ct. Rule 28.

See Sonnier, 380 So. 2d at 7-8 ("Another indication of arbitrariness would be a jury's recommendation of death in disregard of numerous and persuasive mitigating circumstances which clearly outweigh any aggravating circumstances found to be present.").

As this Court has repeatedly recognized, juries sometimes improperly disregard mitigation, leading to disproportionate death sentences. In *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court explained that mitigating evidence of mental retardation and childhood abuse may act as a double-edged sword when evaluated by the jury because it may increase the jury's sense of fear of defendant. *Atkins*, 536 U.S. at 331; *Penry*, 492 U.S. at 324. Similarly, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Court described the risk that the brutality and violence of the crime would overshadow the mitigating evidence of defendant's age, noting that in some cases, juries may conclude that defendant's age is an aggravating rather than mitigating factor. *Roper*, 543 U.S. at 573.

Mental health evidence is precisely the kind of mitigating evidence that some jurors may mistakenly treat as aggravating or give little or no weight. *See, e.g.*, American Psychiatric Ass'n, *Position Statement, Diminished Responsibility in Capital Sentencing* (2004), *available at* http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx (last visited June 2, 2009) ("[M]any observers of capital sentencing proceedings, including participating psychiatrists, believe that juries tend to give too little weight to mitigating evidence of severe mental disorder, leading to inappropriate execution of offenders whose

responsibility was significantly diminished by mental retardation or mental illness"); Christopher Slobogin, *Minding Justice: Laws that Deprive People With Mental Disability of Life and Liberty* 90 (Harvard University Press 2006) ("[M]ental illness is seen as a stigmatizing sign of violence proneness, not as a mitigating factor."); Symposium, *Mental Illness and the Death Penalty in North Carolina: A Diagnostic Approach* 25 (2006), *available at* http://www.charlottelaw.org/downloads/community/MI_DPreport.pdf (last visited June 2, 2009) ("Even when juries do consider mental disability as a mitigating factor, they tend to devalue that information in relation to aggravating evidence.").

Ms. Holmes's case is a textbook example of this risk. The penalty-phase testimony was uncontroverted that Ms. Holmes suffers from Fetal Alcohol Syndrome and brain damage due to her mother's consumption of whiskey and beer during pregnancy. Pet. App'x A8-9. Experts testified that Ms. Holmes has the dysmorphic facial features that are a hallmark of FAS, that neurological testing revealed significant cognitive deficits, and that neurological brain imaging confirmed organic brain damage. *Id.*

The most severe of the fetal alcohol spectrum disorders, FAS has "a devastating impact on the structure and function of the developing central nervous system." Christie L. McGee and Edward P. Riley, *Brain Imaging and Fetal Alcohol Spectrum Disorders*, 42 ANN 1ST SUPER SANITA 46, 46 (2006); *see also From Neurons to Neighborhoods: The Science of Early Childhood Development* 201 (Nat'l Research Council et al. eds., 2000). FAS results in structural and functional brain damage. Alison Niccols, *Fetal*

Alcohol Syndrome and the Developing Socio-emotional Brain, 65 BRAIN AND COGNITION 135, 136 (2007). Some children with FAS, such as Ms. Holmes, are diagnosed as mentally retarded.[12] All suffer from serious cognitive, attention, and behavioral problems. *Id.* at 135. Children with FAS suffer from impairments in frontal lobe executive functions, such as deficits in learning, memory, abstract reasoning, and judgment skills and social skills. *Id.* at 138. They have significantly impaired adaptive functioning skills. *Id.* at 139. These deficits will persist throughout their lifetimes. *From Neurons to Neighborhoods* at 200.

The secondary effects of FAS and its related organic brain damage result in increased "risk of victimization, criminalization, substance abuse, and

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[12] Although there was evidence from both a psychologist and psychiatrist that Ms. Holmes is mentally retarded and meets the definitions of mental retardation under Louisiana law, the Louisiana Supreme Court concluded that trial counsel did not submit this question to the jury and so was she not entitled to relief. Pet. App'x A22; *see also* Pet. App'x B. (Calogero, C.J., dissenting) ("In the case before us, Dr. Vigen and Dr. Williams both testified prior to trial that the defendant in their opinion met the definition of mental retardation set out in La. Code Crim. Proc. art. 905.5.1; Pet. App'x C. (Johnson, J. dissenting) (defense presented evidence from a psychiatrist and psychologist who testified that she met the definition of mental retardation). Negative IQ effects are associated with exposure to heavy prenatal alcohol consumption by mothers during the first trimester. *See, e.g.*, Sandra W. Jacobson, et al., *Maternal Age, Alcohol Abuse History, and Quality of Parenting as Moderators of the Effects of Prenatal Alcohol Exposure on 7.5-year Intellectual Function*, ALCOHOLISM: CLINICAL & EXPERIMENTAL RESEARCH (2004). Ms. Holmes's mother testified that she drank whiskey every day during the first trimester of her pregnancy before switching to beer. Pet. App'x A8.

psychiatric illness." *See, e.g.*, Caron Byrne, *The Criminalization of Fetal Alcohol Syndrome* 1 (2002), *available at* http://depts.washington.edu/fadu/legalissues/CFAS.pdf (last visited June 2, 2009). One study found that over seventy percent of teens and adults with FAS are the victims of sexual or physical abuse. Ann P. Streissguth et al., UNDERSTANDING THE OCCURRENCE OF SECONDARY DISABILITIES IN CLIENTS WITH FETAL ALCOHOL SYNDROME (FAS) AND FETAL ALCOHOL EFFECTS (FAE), FINAL REPORT TO THE CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) (University of Washington, Fetal Alcohol & Drug Unit, Tech. Rep. No. 96-06 1996).

Ms. Holmes's life history followed this risk pattern. At age eleven, she began to smoke marijuana daily. Presentence Report, at 10. One year later, at age twelve, she was raped by her sister's boyfriend and subsequently hospitalized for six months, where she was diagnosed with Post-Traumatic Stress Disorder and Major Depression. Pet. App'x A7; Appellant's Capital Sentence Review Memorandum (App. SRM) at 6-7. She was also sexually abused by her father and other adults living in his house. App. SRM at 7. This pattern of abuse and mental illness continued throughout Ms. Holmes's teen years. App. SRM at 6-7.

Individuals, such as Ms. Holmes, who are exposed to multiple traumas frequently develop Post-Traumatic Stress Disorder ("PTSD"). *See* Ronald Kessler, *Posttraumatic Stress Disorder: The Burden to the Individual and to Society*, 61 J. CLINICAL PSYCHIATRY (Supp. 5) 4 (2000). For many individuals suffering from PTSD, the condition will persist for many years. Soloman, S. & Davidson, J. *Trauma: Prevalence, Impairment and Service, Use, and Cost*, 58

J. CLINICAL PSYCHIATRY (Supp. 9) 5 (1997). PTSD itself is associated with a host of additional symptoms, including social withdrawal, impaired relationships with others, and self-destructive and impulsive behaviors. *Diagnostic and Statistical Manual of Mental Disorders* 465 (Am. Psychiatric Assoc. ed., 4th ed., Text Revision 2000).

Numerous studies have found that the majority of people suffering from PTSD also meet the diagnostic criteria for at least one other psychiatric disorder. *See* Ronald Kessler et al., *Posttraumatic Stress Disorder in the National Comorbidity Survey,* 52 Archives Gen. Psychiatry, 1048 (1995); K. Brady et al., *Comorbidity of Psychiatric Disorders and Posttraumatic Stress Disorder,* 61 J. CLINICAL PSYCHIATRY 22-23, 27 (2000). In Ms. Holmes's case, she was diagnosed with Major Depression with psychotic features and prescribed both anti-psychotic medications and anti-depressants. App. SRM at 6.

The Louisiana Supreme Court was constitutionally required to consider Ms. Holmes's compelling mitigating circumstances when deciding whether her death sentence was proportionate. Meaningful appellate review is a constitutionally required component of any capital punishment scheme and, to serve its constitutional function, this review must contain a mechanism that enables the appellate court to assess the mitigation in a defendant's case.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to grant Brandy Aileen Holmes's Petition for *Certiorari*.

Respectfully submitted,

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June 4, 2009

APPENDIX

APPENDIX I:
DEATH PENALTY APPELLATE REVIEW PROCEDURES

Of the thirty-five states that currently have the death penalty, nineteen states provide for comparative proportionality review:

Alabama, Ala. Code §13A-5-53(b)(3) (enacted 1981);

Delaware, Del. Code Ann. Title 11 §4209(g)(2)(a);

Florida, by case law, *see e.g.*, *Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995);

Georgia, Ga. Code Ann. §17-10-35(c)(3) (enacted 1973);

Kentucky, Ky. Rev. Stat. Ann. §532.075(3)(c) (enacted 1976);

Louisiana, La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (enacted 1977);

Mississippi, Miss. Code Ann. §99-19-105(3)(c) (enacted 1977);

Missouri, Mo. Ann. Stat. §565.035(3)(3) (enacted 1983);

Montana, Mont. Code Ann. §46-18-310(1)(c) (enacted 1977);

Nebraska, Neb. Rev. Stat. §29-2521.03 (enacted 1978);

New Hampshire, N.H. Rev. Stat. Ann. §630:5(XI)(c) (enacted 1986);

North Carolina, N.C. Gen. Stat. §15A-2000(d)(2) (enacted 1977);

Ohio Rev. Code Ann. §2929.05(A) (enacted 1981);

South Carolina, S.C. Code Ann. §16-3-25(C)(3) (enacted 1977);

South Dakota, S.D. Codified Laws §23A-27A-12(3) (enacted 1979);

Tennessee, Tenn. Code Ann. §39-13-206(c)(1)(D) (enacted 1992);

Utah, by case law, *see, e.g.*, *State v. Lafferty*, 20 P.3d 342 (Utah 2001);

Virginia Code § 17.1-313(C)(2) (enacted 1998);

Washington, Wash. Rev. Code Ann. §10.95.130(2)(b) (enacted 1981).

One state has eliminated "proportionality" review but has maintained "excessiveness" review:

Nevada, Nev. Rev. Stat. § 177.055(2)(e).

Seven states provide for substantive appellate review of mitigation through another mechanism:

Arizona, Ariz. Rev. Stat. Ann. §13-703.04(A) (enacted 1994) ("On review, the supreme court shall independently review the trial court's findings of aggravation and mitigation and the propriety of the death sentence.");

Colorado, Colo. Stat. Rev. §18-1.3-1201(6)(a) (2002) ("[T]he supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based.");

Illinois, 720 Ill. Comp. Stat. §5/9-1(i) (enacted 2003) (requiring the Illinois Supreme Court to ask whether a death sentence is "fundamentally unjust" as part of its review); *see also People v. Leger*, 597 N.E.2d 586, 610 (Ill. 1992) ("This court has vacated death sentences where such an extreme penalty was found to be inappropriate, in view of any relevant mitigating factors.");

Indiana, Ind. Code Ann. §35-50-2-9(j) (enacted 2003) (review if "otherwise erroneous");

Kansas, Kan. Stat. Ann. §21-4627(c)(2) (enacted 1994) (appellate court review "whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances.");

Maryland, Md Code Ann., Crim. Law §2-401(d)(2)(iii) (enacted 2002) ("the evidence supports a finding by the court or jury that the aggravating circumstances outweigh the mitigating circumstances under §2-303(h) and (i)(1) of this title");

Oregon, by case law, *State v. Moore,* 927 P.2d 1073 (Or. 1996) (ruling State Supreme Court will review juror's conclusions about death penalty, including decision to impose death penalty).

Four states, although not providing for proportionality review or reweighing of mitigation, require an arbitrariness, prejudice, or product of passion review:

Connecticut, Conn. Gen. Stat. Ann. §53a-46b(b) ("The Supreme Court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor");

Idaho, Idaho Code Ann. §19-2827 (c)(1) (same);

Pennsylvania, 42 PA. Cons. Stat. Ann. §9711 (h)(3)(i) (same);

Wyoming, Wyo. Stat. Ann §6-2-103(d)(i) (same).

Three states, Arkansas, California, and Texas fail to provide for proportionality review, explicit appellate review of mitigation, or arbitrariness review.

Arkansas, Ark. Code Ann. §5-4-603(d)(1) (Arkansas Supreme Court is only required to conduct harmless error review of death sentence if no mitigation is found and one or more aggravators do not exist);

California, Cal. Penal Code §190.4(e) (California Supreme Court will review on appeal the trial

court's denial of a motion to modify a sentence of death to life);

Texas, Tex. Code Crim. Proc. art. 44.251(a) (Texas court of criminal appeals shall reform a death sentence for "legally insufficient evidence" to support an affirmative answer to one of three questions under Texas sentencing statute for reversible error).

Federal law provides for both a substantive review of penalty-phase evidence and an arbitrariness, prejudice, or product of passion review:

18 U.S.C. 3595(b) & (c) ("The court of appeals shall review the entire record in the case, including . . . the information submitted during the sentencing hearing" and shall determine whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.")

By case law, a review of death sentences imposed under the Uniform Code of Military Justice requires a review of all of the facts and circumstances of the case and a comparative proportionality analysis.

United States v. Curtis, 32 M.J. 252, 270-271 (CMA 1991).

* The three states who have recently abolished the death penalty either through legislative action or constitutional rulings — New Jersey, New Mexico, and New York — all provided for proportionality review. *See* New Jersey, N.J. Stat. Ann. §2C:11-3; New Mexico, N.M. Stat. Ann. §31-20A-4(C)(4) (enacted 1979); New York, N.Y. Crim. Proc. Law §470.30(3)(b) (enacted 1995).

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Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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No. 08-1358

In the Supreme Court of the United States

BRANDY AILEEN HOLMES,
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v.
STATE OF LOUISIANA,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Louisiana Association of Criminal Defense Lawyers moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari in the above captioned matter. As grounds for this motion, the *Amicus* state as follows:

1. The Louisiana Association of Criminal Defense Lawyers ("LACDL") is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana.

LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit *amicus* briefs in appropriate cases.

2. LACDL seeks leave to file this amicus brief in support of the Petitioner because the Petition before the Court raises critically important constitutional issues that implicate basic rights of those accused of capital crimes. Members of *amicus curiae* represent clients whose interests are gravely affected by these issues. LACDL, therefore, has a strong institutional interest in the resolution of the question raised by the petitioner concerning the constitutionality of Louisiana's capital punishment scheme. Accordingly, LACDL should be granted leave to file the attached amicus curiae brief, which demonstrates that Louisiana's death penalty statues violate the Eight Amendment's guarantee against arbitrary capital sentencing by not providing for proportionality review.

3. LACDL has timely informed counsel for all parties of its intent to file this *amicus* brief. Petitioner Brandy Aileen Holmes has consented to this filing, but Respondent the State of Louisiana has denied consent.

Wherefore, for the reasons above stated, LACDL request that its motion for leave to file the attached brief as *amicus curiae* be granted.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amicus* in appropriate cases. The Petition before the Court raises critically important issues that implicate basic trial rights. Members of *amicus curiae* represent clients whose interests are gravely affected by these issues.

SUMMARY OF ARGUMENT

In *Furman v. Georgia*, this Court struck down the majority of the states' death penalty statutes, holding that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit

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[1] Pursuant to Rule 37.2, the counsel for *amicus* state that Petitioner has consented to the filing of this brief, but Respondent has not. Accordingly, a motion for leave to file is submitted together with this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* further state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to this brief.

this unique penalty to be so wantonly and freakishly imposed." 408 U.S. 238, 310 (1972). Four years later, in *Gregg v. Georgia*, this Court upheld Georgia's reconstituted death penalty statute on the ground that it provided for "proportionality review," a procedural mechanism that required the Georgia Supreme Court to "compare[] each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." 428 U.S. 153, 198 (1976). In response to *Furman* and *Gregg*, "roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results[, and] . . . [m]ost, such as Georgia's, require[d] the reviewing court, to some extent at least, to determine whether, considering both the crime and the defendant, the sentence is disproportionate to that imposed in similar cases." *Pulley v. Harris*, 465 U.S. 37, 44 (1984).

In 1984, this Court held in *Pulley v. Harris* that proportionality review was not "indispensable" to the constitutionality of California's capital sentencing scheme. *Id.* at 45. In reaching this conclusion, however, this Court did *not* rule that proportionality review is *never* constitutionally required. Rather, the Court ruled that proportionality review was not required in that particular instance because the California statute provided for other important procedural safeguards, including (i) a limited number of capital-eligible crimes, and (ii) the requirement that the courts consider all mitigating circumstances. *Id.* at 51-53.

In the wake of *Harris*, several states repealed their statutory requirements for proportionality

review of capital sentences. *See* Appendix C. Indeed, as time went by, states also began removing or tempering the very safeguards that the *Harris* Court relied on in affirming the constitutionality of California's capital sentencing scheme. Contrary to *Harris's* requirement that capital sentencing statutes "limit[ ] the death sentence to *a small subclass* of capital-eligible cases," *id.* at 53 (emphasis added), states have, over the past twenty-five years, greatly expanded the universe of capital-eligible cases by adding new statutory aggravating factors, expanding existing aggravating factors, broadening their definitions of capital murder and employing vague and undefined language so as to make the death penalty applicable to most murder cases. Moreover, state capital sentencing schemes have increasingly failed to afford mitigating circumstances appropriate consideration, greatly increasing the risk of the arbitrary and discriminatory application of the death penalty.

The lesson of the past twenty-five years is that the states, left to themselves, cannot be relied on to maintain and enforce the important safeguards this Court required in *Harris*. The increasing absence and watering down of these safeguards, combined with the lack of any meaningful proportionality review, has resulted in an arbitrary and discriminating capital sentencing landscape reminiscent of that which existed before *Furman*. In order to rectify this situation, this Court should use the present case, which exemplifies the worst in what has gone wrong at the state level, to hold that proportionality review is constitutionally required in state capital sentencing statutes.

ARGUMENT

I. Since *Harris*, the Critical Safeguards Against the Arbitrary and Discriminatory Application of the Death Penalty have Deteriorated to Such an Extent That Current State Capital Sentencing Schemes Mirror Those in Effect at the Time This Court Decided *Furman*.

A. States Have Greatly Expanded the Universe of Capital-Eligible Crimes.

This Court has consistently held that capital punishment must "'be limited to those offenders who commit a 'narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Because "death as a punishment is unique in its severity and irrevocability," *Gregg*, 428 U.S. at 187, it must be reserved only for those crimes that are "so grievous an affront to humanity that the only adequate response may be the penalty of death," *id.* at 184. Despite the extreme nature of the death penalty, and despite the fact that this Court has "insist[ed] upon confining the instances in which capital punishment may be imposed, *Kennedy*, 128 S. Ct. at 2659, state legislatures have greatly expanded the universe of capital-eligible crimes over the twenty-five years that have transpired since *Harris* was decided.

1. Application of the Death Penalty to Defendants Who Did Not Kill Has Broadened the Class of Capital-Eligible Cases.

Under this Court's precedent, states are permitted to use the felony murder rule to impose the death penalty on individuals who did not kill, so long as the defendant in question sufficiently participated in the underlying felony and displayed a reckless indifference to human life. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982) (concluding that the Eighth Amendment prohibits the "imposition of the death penalty on one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"); *but see Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement"). Accordingly, twenty-nine states now include felony murder as an aggravating factor in capital sentencing, which necessarily expands the universe of capital-eligible cases. *See* Appendix A.

The *Enmund* and *Tison* rules alone, however, do not provide clear standards to assist jurors and courts in reliably determining which defendants are the "worst of the worst." *See* David McCord, *State Death Sentencing for Felony Murder Accomplices under the* Enmund *and* Tison *Standards*, 32 Ariz. St. L.J. 843, 844 (2000) (calling *Enmund*, *Cabana v. Bullock*, and *Tison* "ambiguous and even contradictory in important aspects"); Constitution Project, *Mandatory Justice: The Death Penalty*

Revisited, 20 (Feb. 2006), *available at* http://www.constitutionproject.org/manage/file/30.pdf (The *Tison* rule "permits execution based on vague, highly subjective judgments about culpability"). Accordingly, absent the important safeguard of proportionality review, the application of the death penalty in the felony murder context significantly increases the probability of arbitrary and disproportionate results.

Arbitrary results in the felony murder context occur in a variety of scenarios. In some instances, the defendant is sentenced to death despite the fact that the co-defendant – the actual killer – was sentenced to life imprisonment. *See e.g., People v. Moss,* 792 N.E.2d 1217 (Ill. 2001); *Bishop v. State*, 882 So. 2d 135 (Miss. 2004). In other instances, the defendant is sentenced to death despite inconsistent arguments concerning whether the defendant or the co-defendant committed the murder. *See e.g., Stein v. State*, 995 So. 2d 329 (Fla. 2008); *State v. Scott*, 921 So. 2d 904 (La. 2006); *State v. Tate*, 851 So. 2d 921 (La. 2003); *State v. Parker*, 901 So. 2d 513 (La. Ct. App. 2005); *Romano v. State*, 909 P.2d 92 (Okla. Crim. App. 1995). Other examples include sentencing a defendant to death despite his or her lack of participation in the murder or limited participation in the underlying felony, *see e.g., Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006); *Wood v. State*, 18 S.W.3d 642 (Tex. Crim. App. 2000), and despite the fact that the defendant's equally culpable co-defendant only received life imprisonment, *see e.g., Ex Parte Barbour*, 673 So. 2d 473 (Ala. 1995); *State v. Gerlaugh*, 698 P.2d 694 (Ariz. 1985); *Marquard v. State*, 850 So. 2d 417 (Fla. 2002); *Bassett v. State*, 449 So. 2d 803 (Fla. 1984); *State v. Lavalais*, 685 So. 2d 1048 (La. 1996); *State v. Roache*,

595 S.E.2d 381 (N.C. 2004).[2] A constitutional requirement exacting proportionality review would help prevent the arbitrary executions of defendants in felony murder cases, or at least limit such executions to those instances where it is clear that each specific defendant is morally culpable.

2. Increasing the Number of Aggravating Factors and Employing Vague and Undefined Language Has Also Expanded the Scope of Capital Sentencing Statutes.

Since *Harris*, state legislatures have dramatically broadened capital sentencing statutes in two ways: (i) most statutes contain a long list of aggravating factors that cover nearly all murder cases; and (ii) the statutes' aggravating factors are vague and undefined, thus, subject to arbitrary application.

Between 1995 and 2000, twenty states added new aggravating factors, expanded existing aggravating factors or broadened their definitions of capital murder. Jeffrey Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L.

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[2] As a result of such arbitrary results, a consensus is emerging that felony murder should be eliminated or greatly restricted as an aggravating factor for capital punishment. *See* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. Rev. 1103 (1990); Thomas P. Sullivan, *Proposed Reforms to Illinois Capital Punishment System: A Status Report*, 96 ILL. B.J. 38 (2008); Cal. Comm'n on the Fair Admin. of Justice, *Report and Recommendations on the Administration of the Death Penalty in California*, 60-71 (June 30, 2008), *available at* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf; Constitution Project, *supra*, at XXV, 18-23.

REV. 1, 11-12 (2006). The trend in legislatures toward expanding death penalty eligibility continued into the present decade with twenty states, including Louisiana, broadening their capital sentencing statutes during the period between 2000 and 2006. *Id.* at 12. The new eligibility and aggravating factors added to capital sentencing statutes in the last two decades fall into four categories: (i) facts surrounding the murder, including burglary, robbery and multiple killings; (ii) defendant's motivation for the murder, including a hate crime, premeditation or terrorism; (iii) defendant's status as, for example, a gang member, convicted felon or sexual predator; and (iv) protected classes or victim's status as, for example, a child, elderly or disabled person, or judge or witness. *Id.* at 17-25.

This pattern of expansion has led to long lists of aggravating factors that necessarily preclude limiting the death penalty to a narrow group of defendants. *See* Appendix A. In California, for instance, there are now *twenty-two* statutory aggravating factors, up from only seven when this Court first approved California's capital sentencing scheme in *Harris*. *Compare Harris*, 465 U.S. at 53, n.13 *with* CAL. PENAL CODE § 190.2(a) (2009).[3] Similarly, Illinois currently has *twenty-one* aggravating factors, up from the seven aggravating factors when the state reenacted the death penalty in 1974. *Compare* Leigh Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 LAW &

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[3] Even then, the *Harris* Court acknowledged that California had already "greatly expanded" the number of aggravating factors. *See Harris*, U.S. 465 at 53, n.13 (evaluating the seven factors in the 1977 statute and acknowledging the aggravating factors "[we]re greatly expanded in the current [1983] statute").

CONTEMP. PROBS. 193, 197 (1998) *with* 720 ILL. COMP. STAT. § 5/9-1(b) (2009). Moreover, Arizona has fourteen aggravating factors, ARIZ. REV. STAT. § 13-751(F) (2009); Delaware has twenty-two, 11 DEL. CODE ANN. § 4209(e) (2009); Florida has sixteen, FLA. STAT. 921.141(5) (2009); Louisiana has twelve, LA. CODE CRIM. PROC. ANN. art. 905.4 (2008); Nevada has fifteen, NEV. REV. STAT. § 200.033 (2009); and Pennsylvania has eighteen, 42 PA. CONS. STAT. § 9711(d) (2008). The sheer number of aggravating factors now present in capital sentencing statutes provides more discretion to prosecutors and juries, thereby increasing the risk of the arbitrary and discriminatory application of the death penalty.

Contrary to this Court's precedent, *see Gregg*, 428 U.S. at 197-98 (stating jury discretion should be "'controlled by clear and objective standards so as to produce non-discriminatory application'") (quoting *Coley v. State*, 204 S.E. 2d 612, 615 (Ga. 1974)); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion) (requiring narrow and precise definitions of aggravating factors), state legislatures have also increasingly employed vague and undefined language in the statutory descriptions of these aggravating factors. For example, twenty-six state death penalty statutes include, as an aggravating factor, crimes that are "especially heinous, atrocious or cruel," "outrageously or wantonly vile, horrible or inhuman" or similar such language. *See* Appendix A. The inclusion of such subjective and vague language in state statutes has broadened the class of cases that are death-eligible. Indeed, a prosecutor can describe almost any killing as "heinous" or "vile" if he or she wishes to seek the death penalty. *See* Jeffrey Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's*

Arbitrary and Mandatory Capital Punishment Scheme, 6 WM. & MARY BILL RTS. J. 345, 364-68 (1998).

Other less common but equally subjective aggravating factors in today's death penalty statutes include defendants who "constitute a continuing threat to society," or "display an egregious lack of remorse." *See* Appendix A; *see also* Kirchmeier, *Aggravating and Mitigating Factors*, *supra*, at 368-74. Such language is particular troubling in the context of mentally ill or impaired defendants. As this Court has recognized, such defendants "are typically poor witnesses, and their demeanor may create an *unwarranted impression* of lack of remorse for their crimes." *Atkins*, 536 U.S. at 312 (emphasis added). Indeed, "capital sentencing juries often treat mental disorders not as a mitigating circumstance . . . but as an aggravating circumstance supporting imposition of the death penalty." Christopher Slobogin, *Is* Atkins *the Antithesis or Apotheosis of Anti-Discrimination Principles?: Sorting Out the Group-wide Effects of Exempting People with Mental Retardation from the Death Penalty*, 55 ALA. L. REV. 1101, 1107 (2004).

B. State Capital Sentencing Schemes Fail to Give Appropriate Consideration to Mitigating Circumstances.

While the number of aggravating factors is on the rise, state legislatures have failed to expand the number of statutory mitigating factors, and state trial and appellate courts are increasingly failing to consider mitigating circumstances or are reviewing mitigating circumstances in a perfunctory and meaningless manner. Consequently, the safeguards *Harris* required are now being chipped away at both

ends of the spectrum. *See Harris*, 465 U.S. at 45 (recognizing that "the consideration of mitigating circumstances minimize[s] the risk of wholly arbitrary, capricious or freakish [death] sentences").

1. State Capital Sentencing Statutes Fail to Enumerate Mitigating Circumstances.

This Court has long held that, in order for state capital sentencing schemes to pass constitutional muster, such schemes must not vest unguided sentencing discretion in juries and trial judges. *Gregg*, 428 U.S. at 189 (holding that the jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). As a result, *Harris* held that statutory mitigating factors "'[provide] jury guidance and [lessen] the chance of arbitrary application of the death penalty.'" *Harris*, 465 U.S. at 53 (quoting *Harris v. Pulley*, 692 F.2d 1189, 1194 (1982)). Notwithstanding *Harris*'s mandate, six states still fail to enumerate *any* mitigating circumstances in their capital sentencing statutes. *See* Appendix B. Of the states that do enumerate mitigating factors, most fail to sufficiently enumerate the most fundamental circumstances that one must consider to avoid the arbitrary application of the death penalty.

This Court has held, for example, that a defendant's level of culpability plays a crucial role in the application of capital punishment. *See Roper*, 543 U.S. at 569, 571 (stating that penological justifications for the death penalty are diminished by a "lack of maturity and underdeveloped sense of responsibility," "vulnerability to negative influences and outside pressures," and "reduced control . . . over [ones] environment"); *Atkins*, 536 U.S. at 319

(holding that in order "to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate"); *Godfrey*, 446 U.S. at 433 (setting aside death sentence where defendant lacked "a consciousness materially more 'depraved' than that of any person guilty of murder"). Yet, only two states enumerate the defendant's history of childhood abuse as a mitigating factor. *See* CAL. RULES OF COURT, Rule 4.423(a)(9) (2009) (permitting consideration of abuse only when the victim was the abuser); 720 ILL. COMP. STAT. § 5/9-1(c)(6) (2009); *see also* Kirchmeier, *Aggravating and Mitigating Factors*, *supra*, at 398-99; Ill. Comm'n on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 154 (2002), http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf. And of the twenty-nine states that include felony murder as an aggravating factor, *only four* states include "lack of intent" as a mitigating factor. *See* Appendix B. Moreover, seven states fail to enumerate "mental capacity" as a mitigating factor. *See* Appendix B. And of the twenty-eight states that do enumerate "mental capacity," seventeen do not clearly identify mental illness as falling within this category of mitigation. *See* Appendix B. Consequently, sentencing authorities often equate mental illness with dangerousness – thus, perversely treating it as a *reason* to execute. *See* American Psychiatric Association, *Position Statement, Diminished Responsibility in Capital Sentencing* (2004), http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200406.aspx; Slobogin, *supra*, at 1107; Christopher Slobogin, *Minding Justice: Laws that Deprive People With Mental Disability of Life and Liberty*, 90

(Harvard University Press 2006). When one considers that jurors may not necessarily give nonstatutory factors proper weight, *see* Kirchmeier, *Aggravating and Mitigating Factors*, *supra*, at 398-99, it becomes clear that the failure to enumerate mitigating factors undermines the Eighth Amendment's requirement of robust consideration and weighing of mitigating evidence.

2. State Trial and Appellate Courts Fail to Provide Meaningful Review of Mitigating Circumstances.

This Court has explicitly acknowledged the importance of meaningful consideration and appellate review of mitigating circumstances. *See Harris*, 465 U.S. at 51-53; *see also Parker v. Dugger*, 498 U.S. 308, 321-22 (1991) (reversing death sentence because appellate court failed to consider mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) (vacating death sentence because both trial and appellate court failed to consider mitigating evidence).

Most state capital sentencing statutes, however, do not require a trial judge, upon reviewing a jury's recommendation of death, to make specific findings as to mitigating factors. *See* Appendix B. Compounding this problem is the widespread failure of state appellate courts, when presented with an inadequate trial record, to remand cases for the full consideration of mitigating circumstances. *See e.g., State v. Boggs*, 185 P.3d 111 (Ariz. 2008) (failing to remand for inquiry into defendant's horrendous childhood and mental illness); *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995) (same), *rev'd*, 545 U.S. 374, 379 (2005); *Walker v. State*, 653 S.E.2d 439 (Ga. 2007) (failing to admonish the trial court for its

failure to prepare a detailed report describing defendant's history and circumstances of the case),; *State v. Tate*, 851 So. 2d 921 (La. 2003) (refusing to remand for inquiry into defendant's mental illness and mental retardation); *Bishop v. State*, 882 So. 2d 135 (Miss. 2004) (same); *State v. Shafer*, 969 S.W.2d 719 (Mo. 1998) (same); *State v. Stout*, 46 S.W.3d 689, 704 (Tenn. 2001) (failing to remand for consideration of defendant's minor role in the offense); *Wood v. State*, 18 S.W.3d 642 (Tex. Crim. App. 2000) (failing to remand for consideration of duress). As this Court recognized in *Gregg*, however, "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." 428 U.S. at 195; *see also Harris*, 465 U.S. at 53 (quoting *People v. Frierson*, 599 P.2d 587, 609 (Cal. 1979)) ("'[S]tatutory requirements . . . that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case.'").

Equally troubling is the failure of state appellate courts to adequately review and consider *both* aggravating and mitigating circumstances in a particular case even when the trial record is sufficient. Instead, state appellate courts refuse to reweigh evidence of mitigation, leaving such considerations completely within the jury's discretion. *See e.g., Reams v. State,* 909 S.W.2d 324, 326 (Ark.1995); *Manley v. State*, 918 A.2d 321, 330 (Del. 2007); *Epperson v. Commonwealth*, 197 S.W.3d 46, 63 (Ky. 2006); *Wackerly v. State*, 12 P.3d 1, 19 (Okla. Crim. App. 2000); *Morris v. State*, 940 S.W.2d

610, 614 (Tex. Crim. App. 1997); *State v. Lafferty,* 20 P.3d 342, 359 (Utah 2001). Because state capital sentencing schemes permit jurors to assign little or almost no weight to mitigating circumstances, *see* John Holdrige, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts' Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois,* 19 MISS. C. L. Rev. 283, 285 (1999), meaningful appellate review is necessary to cabin jury discretion. Simply rubber stamping the jury's imposition of death violates the Eighth Amendment's prohibition against the arbitrary and capricious application of the death penalty.

II. This Court Should Grant the Petition in Order to Reaffirm that Proportionality Review is Constitutionally Required Where, As Exists Today, Other Checks on Arbitrariness are Inadequate or Defunct.

A. Proportionality Review is No Longer "Constitutionally Superfluous."

Because, as set forth above, state capital sentencing schemes have become "so lacking" in two critical checks on arbitrariness – *i.e.*, (i) limiting the universe of capital-eligible cases through a narrow list of aggravating factors and (ii) providing meaningful consideration of mitigating circumstances – proportionality review can no longer be considered "constitutionally superfluous." *Harris,* 465 U.S. at 49. Simply put: the states have proven that they cannot be relied on to scrupulously adhere to the important safeguards required by *Harris.* Accordingly and consistent with the spirit and reasoning of the holding in *Harris*, this Court should now hold that the Eighth Amendment requires

proportionality review in state capital sentencing schemes.

The unconstitutionality of state capital sentencing schemes cannot be cured by attempting to limit the number or narrow the language of statutory aggravating factors. Although the dramatic expansion of the universe of capital-eligible cases over the last twenty-five years is disconcerting, it is self-evident that the number and scope of statutory aggravating factors will naturally increase or decrease over time based on the changing moral compass of society. *See Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."). A salient example is the fact that ten states in the last decade have added "acts of terrorism" as a new aggravating factor in their death penalty statutes. *See* Kierchmeier, *Casting a Wider Net*, *supra*, at 27-30.

It is therefore neither wise nor practical for this Court to try to reign in the states by limiting the number of statutory aggravating factors.[4] Because the determination of whether a particular crime is capital-eligible is necessarily a qualitative exercise, not a quantitative one, this Court should explicitly require proportionality review in state capital sentencing schemes to ensure that only the worst of

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[4] *But see* Ill. Comm'n on Capital Punishment, *supra* at 72-73 (proposing a reduction in the number of statutory aggravating factors); Mass. Governors Council on Capital Punishment, *Governor's Council on Capital Punishment: Final Report* 10-12 (2004), *available at* http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf (same).

the worst are given the ultimate punishment of death.

Moreover, although "judging the 'character and record of the individual offender and the circumstances of the particular offense [i]s a constitutionally indispensable part of the process of inflicting the penalty of death,'" *Kennedy*, 128 S. Ct. at 2659 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)), this requirement alone cannot cure an unconstitutional state capital sentencing scheme that arbitrarily metes out the punishment of death. Without proportionality review, sentencing authorities have no context to assess whether a particular defendant's mitigating circumstances are being given the same weight as those of similarly-situated defendants who were sentenced (or not sentenced) to death in the past. Nor do they have any means of assessing whether the "'evolving standards of decency that mark the progress of a maturing society'" dictate that capital punishment is warranted for this particular defendant. *Id.* at 2649 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). As such, this Court should explicitly require that state capital sentencing schemes include a robust consideration of mitigating circumstances and that state appellate courts also conduct a meaningful proportionality review to lessen the arbitrary application of the death penalty.

To be clear, proportionality review necessarily requires the comparison of "each death sentence with the sentences imposed on similarly situated defendants." *Gregg*, 428 U.S. at 198. Accordingly, state appellate courts must compare "not only similar cases in which death was imposed, but similar cases in which death was not imposed." *Zant*

v. Stephens, 462 U.S. 862, 880, n.19 (1983); *see also Walker v. Georgia*, 129 S. Ct. 453, 454-57 (2008). Moreover, state appellate courts must not only evaluate the aggravating factors in those "similar cases," but also the mitigating circumstances leading to the imposition of a death or life sentence in those "similar cases." *See Walker*, 129 S. Ct. at 455 (admonishing the Georgia Supreme Court for its perfunctory review of twenty-one death cases).

Of the thirty-five states that authorize the death penalty today, approximately one-half do not require – whether through statute or case law – that state appellate courts conduct proportionality review of capital sentences. *See* Appendix C. And even with those states that do ostensibly require proportionality review, most state appellate courts are now treating proportionality review as such a perfunctory exercise as to make the review meaningless. Indeed, state appellate courts often mechanically pronounce in their opinions that proportionality review is no longer required under the federal Constitution. *See e.g., State v. Salazar*, 844 P.2d 566, 583 (Ariz. 1992); *State v. Rhoades*, 820 P.2d 665, 682 (Idaho 1991); *People v. King*, 488 N.E.2d 949, 967 (Ill. 1986); *Burris v. State*, 465 N.E.2d 171, 192 (Ind. 1984); *State v. Welcome*, 458 So. 2d 1235, 1252 (La. 1984), *superseded by statute on other grounds*, 1993 IND. ACTS. P.L. 250 § 2, *as recognized in Wrinkles v. State*, 690 N.E.2d 1156, 1171 (Ind. 1997); *Walker v. State*, 863 So. 2d 1, 24 (Miss. 2003); *Battenfield v. State*, 816 P.2d 555, 564 (Okla. Crim. App. 1991). Following such a pronouncement, state appellate courts then typically dedicate no more than one rote paragraph to their so-called "proportionality review." Such paragraph often uses terse and conclusory language to

pronounce that the death sentence is not disproportionate to other similar cases in which death *was* imposed. And, such "similar cases" are typically presented as a string citation without any comparative analysis of the aggravating or mitigating circumstances in those cases.[5] Moreover, state appellate courts also fail to evaluate "similar cases" in which death was *not* imposed. *See* Appendix C. As Justice Stevens noted in *Walker*, cases resulting in life sentences "are eminently relevant to the question whether a death sentence in a given case is proportionate to the offense," and the failure of state appellate courts "to acknowledge

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[5] *Manley*, 918 A.2d at 330 (merely stating, without analysis, that the "case fits the pattern of cases deserving of the death penalty as reflected in the applicable universe of cases"); *Walker*, 653 S.E.2d at 447-48 (concluding in a single paragraph that the death sentence was not disproportionate and string citing, without analysis, twenty-one death cases); *Wrinkles v. State*, 690 N.E.2d 1156, 1173 (Ind. 1997) (merely pronouncing "that the mitigating circumstances that exist are outweighed by the aggravating circumstance" and string citing, without analysis, to other death cases); *Epperson*, 197 S.W.3d at 63 (merely concluding that the death sentence was not disproportionate because similar aggravating factors existed in many death cases decided since 1970 and citing the same cases as it had in numerous decisions); *State v. Draughn*, 950 So. 2d 583, 635 (La. 2007) (concluding in a single paragraph that because Louisiana juries have sentenced defendants to death for murder cases involving robbery, the death sentence was proportionate); *Manning v. State*, 765 So. 2d 516, 522, 523-528 (Miss. 2000) (comparing only death cases involving robbery); *State v. Roache*, 595 S.E.2d 381, 435 (N.C. 2004) (merely string citing, without analysis, death cases for each aggravating factor, despite the jury finding three statutory and forty-four non-statutory factors of mitigation); *Wackerly*, 12 P.3d at 19 (merely concluding in a single paragraph that the death sentence was appropriate without evaluating aggravating or mitigating circumstances or comparing any other cases).

these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that [they] will overlook a sentence infected by impermissible considerations." *Walker*, 129 S. Ct. at 456; *see also State v. Marshall*, 613 A.2d 1059, 1070-71 (N.J. 1992) (proclaiming that any review of a death sentence "would be inadequate if limited to the review of only cases where death sentences were imposed").

B. The Deterioration of Louisiana's Capital Sentencing Review Process Exemplifies Why Proportionality Review Is So Necessary.

Under Louisiana's capital sentencing scheme, the Louisiana Supreme Court is required to determine, *inter alia*, whether the death sentence was arbitrarily imposed and whether it is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." LA. CODE CRIM. PROC. art. 905.9 (2009); La. S. Ct. Rule 28. However, in the entire history of its capital sentencing scheme, the Louisiana Supreme Court has reversed *only one* death sentence for excessiveness.[6] *See State v. Sonnier*, 380 So. 2d 1 (La. 1979). In *Sonnier*, a pre-*Harris* decision, the court set aside the death sentence after considering the extensive mitigating evidence in the defendant's case and after comparing it to four other similar

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[6] Although, in *State v. Weiland*, the Louisiana Supreme Court concluded that, because of the defendant's numerous mitigating circumstances, his death sentence was disproportionate to other sentences, the court reversed exclusively due to the erroneous exclusion of mitigating evidence. 505 So. 2d 702, 710 (La. 1987).

first-degree murder cases, in which three of four defendant's received life imprisonment. *Id.* at 8. Since this Court's ruling in *Harris*, however, Louisiana has greatly diminished the procedural safeguards in its capital sentence scheme. As a result, despite having reviewed at least 200 capital cases since *Harris*, the Louisiana Supreme Court has not reversed a single death sentence for excessiveness.

Since this Court's decision in *Harris*, the Louisiana legislature has vastly expanded the universe of capital-eligible crimes. It has added eight new felonies as aggravating circumstances in which the state may apply the death penalty to defendants who did not kill. *Compare Lowenfield v. Phelps*, 484 U.S. 231, 243, n.6 (1988) *with* LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1), 905.5 (2008) (adding the commission of murder during the course of a forcible rape, second-degree kidnapping, assault by drive by shooting, first-degree robbery, second-degree robbery, cruelty to juveniles, second-degree cruelty to juveniles or terrorism, and failing to enumerate "lack of intent" as a mitigating circumstance). It has also added two separate groups of individuals to protected classes, *see* La. R.S. 14:30-(A)(2) (2008) (civilian employees of the state police or forensic laboratories); La. R.S. 14:30-(A)(5) (2008) (victims sixty-five years of age or older), and added four whole new aggravating factors, *see* La. R.S. 14:30-(A)(6-9) (2008). Moreover, Louisiana's capital sentencing statute includes, as an aggravating factor, crimes "committed in an especially heinous, atrocious or cruel manner," LA. CODE CRIM. PROC. ANN. art. 905.4(A)(7) (2008), which is nothing more than a "catch-all" phrase applicable to almost every murder. Louisiana's capital

sentencing scheme also does not require its juries to weigh aggravating factors against mitigating factors and does not impose a burden of proof on its juries' final determination that death is the appropriate punishment. *See State v. Anderson*, 996 So. 2d 973, 1015 (La. 2008); *State v. Scott*, 921 So. 2d 904, 928-929 (La. 2006); *State v. Williams,* 831 So. 2d 835, 846 (La. 2002), *superseded by statute on other grounds,* LA. CODE CRIM. PROC. ANN. art. 905.5.1, *as recognized in State v. Dunn*, 974 So. 2d 658, 660-61 (La. 2008).

As the instant case and other recent Louisiana capital cases demonstrate, the meaningful appellate review of capital sentences conducted by the Louisiana Supreme Court has diminished since *Sonnier* to such an extent that it is now essentially non-existent. *See, e.g., Draughn*, 950 So. 2d at 635; *Tate*, 851 So. 2d at 943. In the instant matter, the trial record and sentencing memorandum outlined extensive mitigating evidence, including Ms. Holmes' mental diagnoses of fetal alcohol syndrome and post-traumatic stress disorder, low intelligence, susceptibility to her co-defendant's physical and emotion domination and the likelihood of her minimal role in the underlying crime. Appellant's Capital Sentence Review Memorandum at 4-5, 9. The Louisiana Supreme Court, however, glossed over and ignored this evidence in its review. *See Holmes, State v. Holmes*, 5 So. 3d 42, 94-98 (La. 2008). In fact, in the mere two paragraphs where the court discussed Ms. Holmes' childhood and background, it is unclear whether the court considered these facts as mitigating or aggravating. *Id.* at 95.

Moreover, the proportionality review conducted by the Louisiana Supreme Court in the petitioner's

case was a perfunctory exercise at best. It limited its analysis to the consideration only of the aggravating factors of the petitioner's crime compared to the aggravating factors of other death-sentence cases. *Id.* at 96-98. In doing so, it made merely three conclusory statements: (i) "Louisiana juries appear especially prone to impose capital punishment for crimes committed in the home," *id.* at 97; (ii) "Louisiana juries have not hesitated in imposing the death penalty in a variety of cases involving multiple deaths or when a defendant creates the risk of death or great harm to more than one person," *id.* at 97-98; and (iii) "juries in Louisiana have readily returned the death sentence when the elderly are preyed upon as victims," *id.* at 98. Following each statement, the court included string citations without analysis of any additional aggravating circumstances or any mitigating circumstances in those cases, and without any discussion of Ms. Holmes' numerous mitigating circumstances. *Id.* at 96-98. In addition, the court failed to compare Ms. Holmes' case to any cases where death was *not* imposed. *Id.* Had the Louisiana Supreme Court looked outside the universe of death-sentence cases, it would have found numerous first-degree murder cases with aggravating circumstances similar to the petitioner's where the jury imposed life sentences.

Louisiana's capital punishment scheme exemplifies the trend among states to eviscerate the procedural safeguards this Court affirmed in *Harris*. Indeed, Louisiana's chillingly casual death sentencing review illustrates the necessity of proportionality review as a constitutional requirement.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court grant petitioner's writ for certiorari.

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Appendix

APPENDIX A – AGGRAVATING FACTORS

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
Ala.	ALA. CODE § 13A-5-49 (LexisNexis 2009)	✓			✓	10
Ariz.	ARIZ. REV. STAT. § 13-751(F) (LexisNexis 2009)	✓			✓	14
Ark.	ARK. CODE ANN. § 5-4-604 (2008)	✓				10
Cal.	CAL. PENAL CODE § 190.2(a) (Deering 2009)	✓			✓	22
Colo.	COLO. REV. STAT. §§ 18-1.3-401, 18-1.4-102	✓			✓	6

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
	(2008)					
Conn.	CONN. GEN. STAT. § 53a-46a (2008)	✓			✓	8
Del.	DEL. CODE ANN. tit. 11, § 4209(e) (2009)	✓			✓	22
Fla.	FLA. STAT. § 921.141(5) (2009)	✓			✓	16
Ga.	GA. CODE ANN. § 17-10-30 (2009)	✓				11
Idaho	IDAHO CODE ANN. § 19-2515(9) (2008)	✓			✓	11

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
Ill.	720 ILL. COMP. STAT. 5/9-1(b) (2009)	✓			✓	21
Ind.	IND. CODE ANN. § 35-50-2-9(b) (LexisNexis 2009)				✓	16
Kan.	KAN. STAT. ANN. § 21-4636 (2008)	✓				8
Ky.	KY. REV. STAT. ANN. § 532.025(2)(a) (LexisNexis 2009)				✓	8
La.	LA. CODE CRIM. PROC. ANN. art. 905.4 (2008)	✓			✓	12

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
Md.	MD. CODE ANN., CRIM. LAW § 2-203(g) (LexisNexis 2008)				✓	10
Miss.	MISS. CODE ANN. § 99-19-101(5) (2008)	✓			✓	8
Mo.	MO. REV. STAT. § 565.032.2 (2009)	✓			✓	17
Mont.	MONT. CODE ANN. § 46-18-303 (2007)				✓	4
Neb.	NEB. REV. STAT. ANN. § 29-2523(1) (LexisNexis 2009)	✓				9
Nev.	NEV. REV. STAT. §				✓	15

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
	200.033 (2009)					
N.H.	N.H. REV. STAT. ANN. § 630:5(VII) (LexisNexis 2009)	✓			✓	10
N.Y.	N.Y. CRIM. PROC. LAW § 400.27(7) (Consol. 2009); N.Y. PENAL LAW § 125.27.1.(a)(vii) (Consol. 2009)	✓			✓	2
N.C.	N.C. GEN. STAT. § 15A-2000(e) (2009)	✓			✓	11
Ohio	OHIO REV. CODE ANN. § 2929.04(A) (LexisNexis 2009)			✓	✓	10

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
Okla.	OKLA. STAT. ANN. tit. 21 § 701.12 (2008)	✓	✓			8
Or.	OR. REV. STAT. § 163.150(1)(b) (2007)		✓			4
Pa.	42 PA. CONS. STAT. § 9711(d) (2008)				✓	18
S.C.	S.C. CODE ANN. § 16-3-20(C)(a) (2008)				✓	12
S.D.	S.D. CODIFIED LAWS § 23A-27A-1 (2009)	✓				10
Tenn.	TENN. CODE ANN. § 39-13-204(i) (2009)	✓			✓	15
Tex.	TEX. CODE CRIM. PROC. ANN. art.37.017		✓		✓	9

State[1]	Statute	Crime is Especially Heinous, Atrocious or Cruel[2]	Δ is a Future Danger or Continuing Threat to Society[3]	Δ has Lack of Remorse[4]	Felony Murder[5]	Total Number of Aggravating Factors[6]
	(Vernon 2009); TEX. PENAL CODE ANN. § 19.03(a) (Vernon 2009)					
Utah	UTAH CODE ANN. § 76-5-202 (2008)	✓			✓	5
Va.	VA. CODE ANN. §§ 18.2-31, 19.2-264.2 (2009)	✓	✓		✓	4[7]
Wash.	WASH. REV. CODE ANN. § 10.95.020 (LexisNexis 2009)	✓		✓	✓	14
Wyo.	WYO. STAT. ANN. § 6-2-102(h) (2008)	✓	✓		✓	12
Total		**26**	**5**	**2**	**29**	

[1] Table contains aggravating factors from the thirty-five states that currently have death penalty statutes and from New York whose capital punishment statute has been held unconstitutional, but has not been repealed. Fourteen states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Minnesota, Michigan, New Jersey, New Mexico, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin) and the District of Columbia no longer have the death penalty. Death Penalty Information Center, http://www.deathpenaltyinfo.org/FactSheet.pdf (last accessed on Apr. 21, 2009). On March 25, 2009, the New Hampshire House voted 193-174 to abolish the death penalty, and as a result, New Hampshire may soon join the list of states without the death penalty. *See* Associated Press, *New Hampshire: Vote to Repeal Death Penalty*, N.Y. Times, Mar. 25 2009, *available at* http://www.nytimes.com/2009/03/26/us/26brfs-VOTETOREPEAL_BRF.html.

[2] Twenty-six states (including New York) include crimes that are "especially heinous, atrocious or cruel," "outrageously or wantonly vile, horrible or inhuman" or similar such language an aggravating factor in their capital sentencing statutes. *See* ALA. CODE § 13A-5-49(8) (LexisNexis 2009); ARIZ. REV. STAT. § 13-751(F)(6) (LexisNexis 2009); ARK. CODE ANN. § 5-4-604(8)(A) (2008); CAL. PENAL CODE § 190.2(a)(14) (Deering 2009); COLO. REV. STAT. §§ 18-1.3-1302(5)(j), 18-1.4-102(5)(j) (2008); CONN. GEN. STAT. § 53a-46a(i)(4) (2008); DEL. CODE ANN. tit. 11, § 4209 (e)(l) (2009); FLA. STAT. § 921.141(5) (2009); GA. CODE ANN. § 17-10-30(b)(7) (2009); IDAHO CODE ANN. § 19-2515(9)(e) (2008); 730 ILL. COMP. STAT. 5/5-5-3.2(b)(2) (2009); KAN. STAT. ANN. §§ 21-4625(6), 21-4636(f), 21-4716(c)(2)(B) (2008); LA. CODE CRIM. PROC. ANN. art. 905.4 (A)(7) (2008); MISS. CODE ANN § 99-19-101(5)(h) (2008); MO. REV. STAT. § 565.032.2(7) (2009); NEB. REV. STAT. ANN. § 29-2523(1)(d) (LexisNexis 2009); N.H. REV. STAT. ANN. § 630:5.VII.(h) (LexisNexis 2009); N.Y. PENAL LAW § 125.27.1.(a)(x) (Consol. 2009); N.C. GEN. STAT. §§ 15A-1340.16(d)(7), 15A-2000(e)(9) (2009); OKLA. STAT. tit. 21, § 701.12.4 (2009); S.D. CODIFIED LAWS § 23A-27A-1(6) (2009); TENN. CODE ANN. §§ 39-13-204(i)(5), 39-13-204(i)(13), 40-35-

114(5) (2009); UTAH CODE ANN. §§ 76-5-202(1)(e), (1)(r), (1)(s) (2008); VA. CODE ANN. § 19.2-264.2 (2009); WASH. REV. CODE ANN. § 9.94A.535(3) (LexisNexis 2009); WYO. STAT. ANN § 6-2-102(h)(vii) (2008).

[3] Five states include as an aggravating factor in their capital sentencing statutes whether defendants pose a "future danger" or "constitute a continuing threat to society." *See* OKLA. STAT. tit. 21, § 701.12.7 (2009); OR. REV. STAT. § 163.150(1)(b)(B) (2007); TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(b)(1) (Vernon 2009); VA. CODE ANN. § 19.2-264.2 (2009); WYO. STAT. ANN § 6-2-102(h)(xi) (2008).

[4] Two states include as an aggravating factor in their capital sentencing statutes whether defendants "display an egregious lack of remorse." *See* OHIO REV. CODE ANN. § 2929.12.(D)(5) (LexisNexis 2009); WASH. REV. CODE § 9.94A.535(3)(q) (LexisNexis 2009).

[5] Twenty-nine states (including New York) include felony murder as an aggravating factor in their capital sentencing statutes. *See* ALA. CODE §§ 13A-5-40(a)(1)-(4), (8), (9) (LexisNexis 2009); ARIZ. REV. STAT. § 13-751(F)(8), (11) (LexisNexis 2009); CAL. PENAL CODE § 190.2(a)(17) (a)-(l) (Deering 2009); COLO. REV. STAT. §§ 18-1.3-1302(5)(g), 18-1.4-102(5)(j) (2008); CONN. GEN. STAT. § 53a-46a(i)(1) (2008); DEL. CODE ANN. tit. 11, § 4209 (e)(j) (2009); FLA. STAT. § 921.141(5)(d) (2009); IDAHO CODE ANN. § 19-2515(9)(g) (2008); 720 ILL. COMP. STAT. 5/9-1(b)(6) (2009); IND. CODE ANN. § 35-50-2-9(b)(1) (LexisNexis 2009); KY. REV. STAT. ANN. § 532.025(2)(a)(2) (LexisNexis 2009); LA. CODE CRIM. PROC. ANN. art. 905.4 (A)(1) (2008); MD. CODE ANN., CRIM. LAW § 2-303(g)(1)(x) (LexisNexis 2008); MISS. CODE ANN. § 99-19-101(5)(d) (2008); MO. REV. STAT. § 565.032.2(11) (2009); MONT. CODE ANN. § 46-18-303(2)-(4) (2007); NEV. REV. STAT. ANN. § 200.033.4 (LexisNexis 2009); N.H. REV. STAT. ANN. § 630:5.VII.(b) (LexisNexis 2009); N.Y. PENAL LAW § 125.27.1.(a)(vii) (Consol. 2009); N.C. GEN. STAT. §§ 15A-2000(e)(5), (e)(11) (2009); OHIO REV. CODE ANN. § 2929.04.(A)(7) (LexisNexis 2009); 42 PA. CONS. STAT. §§ 9711(d)(6), (d)(13) (2008); S.C. CODE ANN. § 16-3-20(C)(a)(1)-(a)-(j) (2008); TENN. CODE ANN. § 39-13-204(i)(7) (2009); TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2009); UTAH CODE ANN. § 76-5-202(d) (2008); VA. CODE

ANN. § 18.2-31 (2009); WYO. STAT. ANN § 6-2-102(h)(iv) (2008); WASH. REV. CODE ANN. § 10.95.020(11) (LexisNexis 2009); WYO. STAT. ANN § 6-2-102(h)(xii) (2008).

[6] Statutory aggravating factors for each state are enumerated in the following statutes: ALA. CODE § 13A-5-49 (LexisNexis 2009); ARIZ. REV. STAT. § 13-751(F) (LexisNexis 2009); ARK. CODE ANN. § 5-4-604 (2008); CAL. PENAL CODE § 190.2(a) (Deering 2009); COLO. REV. STAT. § 18-1.3-401 (2008); CONN. GEN. STAT. § 53a-46a (2008); DEL. CODE ANN. tit. 11, § 4209(e) (2009); FLA. STAT. § 921.141(5) (2009); GA. CODE ANN. § 17-10-30 (2009); IDAHO CODE ANN. § 19-2515(9) (2008); 720 ILL. COMP. STAT. 5/9-1(b) (2009); IND. CODE ANN. § 35-50-2-9(b) (LexisNexis 2009); KAN. STAT. ANN. § 21-4636 (2008); KY. REV. STAT. ANN. § 532.025(2)(a) (LexisNexis 2009); LA. CODE CRIM. PROC. ANN. art. 905.4 (2008); MD. CODE ANN., CRIM. LAW § 2-203(g) (LexisNexis 2008); MISS. CODE ANN. § 99-19-101(5) (2008); MO. REV. STAT. § 565.032.2 (2009); MONT. CODE ANN. § 46-18-303 (2007); NEB. REV. STAT. ANN. § 29-2523 (LexisNexis 2009); NEV. REV. STAT. § 200.033 (2009); N.H. REV. STAT. ANN. § 630:5(VII) (LexisNexis 2009); N.Y. CRIM. PROC. LAW § 400.27(7) (Consol. 2009); N.Y. PENAL LAW § 125.27.1.(a)(vii) (Consol. 2009); N.C. GEN. STAT. § 15A-2000(e) (2009); OHIO REV. CODE ANN. § 2929.04(A) (LexisNexis 2009); OKLA. STAT. ANN. tit. 21, § 701.12 (2008); OR. REV. STAT. § 163.150(1)(b) (2007); 42 PA. CONS. STAT. § 9711(d) (2008); S.C. CODE ANN. § 16-3-20(C)(a) (2008); S.D. CODIFIED LAWS § 23A-27A-1 (2009); TENN. CODE ANN. § 39-13-204(i) (2009); TEX. CODE CRIM. PROC. ANN. art. 37.017 (Vernon 2009); TEX. PENAL CODE ANN. § 19.03(a) (Vernon 2009); UTAH CODE ANN. § 76-5-202 (2008); VA. CODE ANN. § 19.2-264.2 (2009); WASH. REV. CODE ANN. § 10.95.020 (LexisNexis 2009); WYO. STAT. ANN. § 6-2-102(h) (2008).

[7] In addition to including felony murder as an aggravating factor, *see* VA. CODE ANN. § 18.2-31 (2009), Virginia includes as aggravating factors the defendant's "past criminal record of convictions," whether the defendant "constitute[s] at continuing serious threat to society," and whether the offense at issue was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated batter to the victim," *see id.* § 19.2-264.2.

APPENDIX B – MITIGATING FACTORS

State[1]	Statute	Lack of Intent[2]	Mental Capacity[3]	Mental Illness or Disorder[4]	Specific Findings of Mitigating Factors[5]	No Enumerated Mitigating Factors[6]
Ala.	ALA. CODE §§ 13A-5-51, 13A-5-52 (2009)		✓			
Ariz.	ARIZ. REV. STAT. § 13-703(G) (2008)	✓	✓			
Ark.	ARK. CODE ANN. § 5-4-605 (2008)		✓	✓		
Cal.	CAL. PENAL CODE § 190.3 (Deering 2009)		✓	✓		
Colo.	COLO. REV. STAT. §§ 18-1.3-1302, 18-1.4-102 (2008)	✓	✓		✓	
Conn.	CONN. GEN. STAT. § 53a-46a(h) (2008)	✓	✓		✓	

State[1]	Statute	Lack of Intent[2]	Mental Capacity[3]	Mental Illness or Disorder[4]	Specific Findings of Mitigating Factors[5]	No Enumerated Mitigating Factors[6]
Del.	DEL. CODE ANN. tit. 11, § 4209(e) (2009)					✓
Fla.	FLA. STAT. § 921.141(6) (2009)		✓		✓	
Ga.	GA. CODE ANN. § 17-10-30 (2009)					✓
Idaho	IDAHO CODE ANN. § 19-2515(h) (2008)				✓	✓
Ill.	720 ILL. COMP. STAT. 5/9-1(c) (2009)	✓	✓			
Ind.	IND. CODE ANN. § 35-50-2-9(c) (LexisNexis 2009)		✓	✓		
Kan.	KAN. STAT. ANN. § 21-4637 (2008)		✓			

State[1]	Statute	Lack of Intent[2]	Mental Capacity[3]	Mental Illness or Disorder[4]	Specific Findings of Mitigating Factors[5]	No Enumerated Mitigating Factors[6]
Ky.	KY. REV. STAT. ANN. § 532-025(2)(b) (2009)		✓	✓		
La.	LA. CODE CRIM. PROC. ANN. art. 905.5 (2008)		✓	✓		
Md.	MD. CODE ANN., CRIM. LAW § 2-303(h)(2) (LexisNexis 2008)		✓	✓	✓	
Miss.	MISS. CODE ANN. § 99-19-101(6) (2008)		✓		✓	
Mo.	MO. REV. STAT. § 565.032.3 (2009)		✓			
Mont.	MONT. CODE ANN. § 46-18-304 (2007)		✓			

State[1]	Statute	Lack of Intent[2]	Mental Capacity[3]	Mental Illness or Disorder[4]	Specific Findings of Mitigating Factors[5]	No Enumerated Mitigating Factors[6]
Neb.	NEB. REV. STAT. ANN. § 29-2523(2) (LexisNexis 2009)		✓	✓		
Nev.	NEV. REV. STAT. § 200.035 (2009)					
N.H.	N.H. REV. STAT. ANN. § 630:5(VI) (LexisNexis 2009)		✓			
N.Y.	N.Y. CRIM. PROC. LAW § 400.27(9) (Consol. 2009)		✓		✓	
N.C.	N.C. GEN. STAT. §15A-2000(f) (2009)		✓			
Ohio	OHIO REV. CODE ANN. § 2929.04(B) (LexisNexis 2009)		✓	✓		

State[1]	Statute	Lack of Intent[2]	Mental Capacity[3]	Mental Illness or Disorder[4]	Specific Findings of Mitigating Factors[5]	No Enumerated Mitigating Factors[6]
Okla.	OKLA. U.J.I.-C.R. 4-78					✓
Or.	OR. REV. STAT. § 163.150(1)(c) (2007)					
Pa.	42 PA. CONS. STAT. § 9711(e) (2008)		✓			
S.C.	S.C. CODE ANN. § 16-3-20(C)(b) (2008)		✓			
S.D.	S.D. CODIFIED LAWS § 23A-27A-1 (2009)					✓
Tenn.	TENN. CODE ANN. § 39-13-204(j) (2009)		✓	✓		
Tex.	TEX. CODE CRIM. PROC. ANN. art. 37.017 (Vernon 2009)					✓

State[1]	Statute	Lack of Intent[2]	Mental Capacity[3]	Mental Illness or Disorder[4]	Specific Findings of Mitigating Factors[5]	No Enumerated Mitigating Factors[6]
Utah	UTAH CODE ANN. § 76-3-207(4) (2008)		✓	✓		
Va.	VA. CODE ANN. § 19.2-264.4 (2009)		✓			
Wash.	WASH. REV. CODE ANN. § 10.95.070 (LexisNexis 2009)		✓	✓		
Wyo.	WYO. STAT. ANN. § 6-2-102(j) (2008)		✓			
Total		**4**	**28**	**11**	**7**	**6**

[1] Table contains mitigating factors from the thirty-five states that currently have death penalty statutes and from New York whose capital punishment statute has been held unconstitutional, but has not been repealed. Fourteen states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Minnesota, Michigan, New Jersey, New Mexico,

North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin) and the District of Columbia no longer have the death penalty. Death Penalty Information Center, http://www.deathpenaltyinfo.org/FactSheet.pdf (last accessed on Apr. 21, 2009). On March 25, 2009, the New Hampshire House voted 193-174 to abolish the death penalty, and as a result, New Hampshire may soon join the list of states without the death penalty. *See* Associated Press, *New Hampshire: Vote to Repeal Death Penalty*, N.Y. Times, Mar. 25 2009, *available at* http://www.nytimes.com/2009/03/26/us/26brfs-VOTETOREPEAL_BRF.html.

[2] Four states include the defendant's "lack of intent" as a mitigating factor in their capital sentencing statutes. *See* ARIZ. REV. STAT. § 13-703(G)(4) (2008); COLO. REV. STAT. § 18-1.3-1302(4)(e) (2008); CONN. GEN. STAT. § 53a-46a(h)(4) (2008); 720 ILL. COMP. STAT. 5/9-1(c)(2) (2009).

[3] Twenty-eight states (including New York) include as a mitigating factor in their capital sentencing statutes the defendant's lack in mental capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. *See* ALA. CODE § 13A-5-51(6) (2009); ARIZ. REV. STAT. § 13-703(G)(1) (2008); ARK. CODE ANN. § 5-4-605(3) (2008); CAL. PENAL CODE § 190.3 (Deering 2009); COLO. REV. STAT. § 18-1.3-1302(4)(b) (2008); CONN. GEN. STAT. § 53a-46a(h)(3) (2008); FLA. STAT. § 921.141(6)(f) (2009); 720 ILL. COMP. STAT. 5/9-1(c)(7) (2009); IND. CODE ANN. § 35-50-2-9(c)(6) (LexisNexis 2009); KAN. STAT. ANN. § 21-4637(f) (2008); KY. REV. STAT. ANN. § 532-025(2)(b)(7) (LexisNexis 2009); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (2008); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(iv) (LexisNexis 2008); MISS. CODE ANN. § 99-19-101(6)(f) (2008); MO. REV. STAT. § 565.032.3(6) (2009); MONT. CODE ANN. § 46-18-304(d) (2007); NEB. REV. STAT. ANN. § 29-2523(2)(g) (LexisNexis 2009); N.H. REV. STAT. ANN. § 630:5(VI)(a) (LexisNexis 2009); N.Y. CRIM. PROC. LAW § 400.27(9)(b) (Consol. 2009); N.C. GEN. STAT. § 15A-2000(f)(6) (2009); OHIO REV. CODE ANN. § 2929.04(B)(3) (LexisNexis 2009); 42 PA. CONS. STAT. § 9711(e)(3) (2008); S.C. CODE ANN. § 16-3-20(C)(b)(6) (2008); TENN. CODE ANN. § 39-13-204(j)(8) (2009); UTAH CODE ANN. § 76-3-207(4)(d) (2008); VA. CODE ANN. § 19.2-264.4(B)(iv) (2009); WASH. REV. CODE ANN. § 10.95.070(6) (2009); WYO. STAT. ANN. § 6-2-102(j)(vi) (2008).

[4] Eleven states specify mental illness or defect as a mitigating factor in their capital sentencing statutes. *See* ARK. CODE ANN. § 5-4-605(3) (2008); CAL. PENAL CODE § 190.3(h) (Deering 2009); IND. CODE ANN. § 35-50-2-9(c)(2) (LexisNexis 2009); KY. REV. STAT. ANN. § 532-025(2)(b)(7) (LexisNexis 2009); LA. CODE CRIM. PROC. ANN. art. 905.5(b) (2008); MD. CODE ANN., CRIM. LAW § 2-303(h)(2)(iv) (LexisNexis 2008); NEB. REV. STAT. ANN. § 29-2523(2)(g) (LexisNexis 2009); OHIO REV. CODE ANN. § 2929.04(B)(3) (LexisNexis 2009); TENN. CODE ANN. § 39-13-204(j)(8) (2009); UTAH CODE ANN. § 76-3-207(4)(d) (2008); WASH. REV. CODE ANN. § 10.95.070(6) (2009).

[5] Seven states (including New York) require specific findings of mitigating factors in their capital sentencing statutes. *See* COLO. REV. STAT. § 18-1.3-1302(3); CONN. GEN. STAT. § 53a-46a(h) (2008); FLA. STAT. § 921.141(3) (2009); IDAHO CODE ANN. § 19-2515(h) (2008); MD. CODE ANN., CRIM. LAW § 2-303(i)(1) (LexisNexis 2008); MISS. CODE ANN. § 99-19-101(3) (2008); N.Y. CRIM. PROC. LAW § 400.27(11) (Consol. 2009).

[6] Six states fail to enumerate *any* mitigating circumstances in their capital sentencing statutes. *See* 11 DEL. CODE ANN. § 4209(c)(1) (2009); GA. CODE ANN. § 17-10-30 (2009); IDAHO CODE ANN. § 19-2515(3)(b) (2008); OKLA. U.J.I.-C.R. 4-78; S.D. CODIFIED LAWS § 23A-27A-1 (2009); TEX. CODE CRIM. PROC. ANN. art. 37.071(d)(1) (Vernon 2009).

APPENDIX C – PROPORTIONALITY REVIEW

State[1]	Repealed Statutory Requirement for Proportionality Review[2]	Statutory or Case Law Requirement for Proportionality Review[3]	Proportionality Review – Consideration of Capital Cases – Death & Life Sentences[4]	Proportionality Review – Consideration of Capital Cases – Death Sentences Only[5]
Ala.		✓		✓
Ariz.				
Ark.				
Cal.				
Colo.				
Conn.	✓			
Del.		✓	✓	
Fla.		✓	✓	
Ga.		✓		✓
Idaho	✓			
Ill.				
Ind.				

State[1]	Repealed Statutory Requirement for Proportionality Review[2]	Statutory or Case Law Requirement for Proportionality Review[3]	Proportionality Review – Consideration of Capital Cases – Death & Life Sentences[4]	Proportionality Review – Consideration of Capital Cases – Death Sentences Only[5]
Kan.				
Ky.		✓		✓
La.		✓		✓[6]
Md.[7]	✓			
Miss.		✓		✓
Mo.		✓		✓
Mont.		✓	✓	
Neb.		✓		✓
Nev.[8]	✓			
N.H.		✓[9]		
N.Y.		✓	✓[10]	
N.C.		✓	✓	
Ohio		✓		✓

State[1]	Repealed Statutory Requirement for Proportionality Review[2]	Statutory or Case Law Requirement for Proportionality Review[3]	Proportionality Review – Consideration of Capital Cases – Death & Life Sentences[4]	Proportionality Review – Consideration of Capital Cases – Death Sentences Only[5]
Okla.	✓			
Or.				
Pa.	✓			
S.C.		✓		✓
S.D.		✓	✓	
Tenn.		✓	✓	
Tex.				
Utah		✓		✓
Va.		✓		✓[11]
Wash.		✓	✓	
Wyo.	✓			
Total	**7**	**20**	**8**	**11**

[1] Table contains information concerning the thirty-five states that currently have death penalty statutes and from New York whose capital punishment statute has been held unconstitutional, but has not been repealed. Fourteen states (Alaska, Hawaii, Iowa, Maine, Massachusetts, Minnesota, Michigan, New Jersey, New Mexico, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin) and the District of Columbia no longer have the death penalty. Death Penalty Information Center, http://www.deathpenaltyinfo.org/FactSheet.pdf (last accessed on Apr. 21, 2009). On March 25, 2009, the New Hampshire House voted 193-174 to abolish the death penalty, and as a result, New Hampshire may soon join the list of states without the death penalty. *See* Associated Press, *New Hampshire: Vote to Repeal Death Penalty*, N.Y. Times, Mar. 25 2009, *available at* http://www.nytimes.com/2009/03/26/us/26brfs-VOTETOREPEAL_BRF.html.

[2] Nevada and Oklahoma repealed their statutory requirement for proportionality review in 1985, followed by Wyoming in 1989, Maryland in 1992, Idaho in 1994, Connecticut in 1995, and Pennsylvania in 1997. *See State v. Breton*, 824 A.2d 778, 832 (Conn. 2003); *Commonwealth. v. Watkins*, 843 A.2d 1203, 1219 n.18 (Pa. 2003); *see also* Leigh B. Bienen, *Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only the "Appearance of Justice"?* , 87 J. CRIM. L. & CRIMINOLOGY 130, app. A, at 222-61 (1996).

[3] Of the thirty-five states that currently authorize the death penalty, nineteen require, either through statute or case law, that state appellate courts conduct proportionality review of capital sentences. Most of the nineteen states as well as New York have enacted a statutory requirement for proportionality review. *See* ALA. CODE § 13A-5-53(b)(3) (LexisNexis 2009) (enacted 1981); DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (2009) (enacted 1953); GA. CODE ANN. § 17-10-35(c)(3) (2008) (enacted 1973); KY. REV. STAT. ANN. § 532.075(3)(c) (LexisNexis 2009) (enacted 1976); LA. CODE CRIM. PROC. ANN. art. 905.9.1(1)(c) (2008) (enacted 1976); MISS. CODE ANN. § 99-19-105(3)(c) (2008) (enacted 1977); MO. ANN. STAT. § 565.035(3)(3) (2009) (enacted 1983); MONT. CODE ANN. § 46-18-310(1)(c) (2007) (enacted 1977); NEB. REV. STAT. ANN. § 29-2521.03 (LexisNexis 2009) (enacted 1978); N.H. REV. STAT. ANN. § 630:5(XI)(c)(4) (LexisNexis 2009) (enacted 1991); N.Y. PENAL LAW § 470.30(3) (Consol. 2009)

(enacted 1995); N.C. GEN. STAT. § 15A-2000(d)(2) (2009) (enacted 1977); OHIO REV. CODE ANN. § 2929.05(A) (LexisNexis 2009) (enacted 1981); S.C. CODE ANN. § 16-3-25(C)(3) (2008) (enacted 1977); S.D. CODIFIED LAWS § 23A-27A-12(3) (2009) (enacted 1979); TENN. CODE ANN. § 39-13-206(c)(1)(D) (2009) (enacted 1992); VA. CODE ANN. § 17.1-313(C)(2) (2009) (enacted 1977); WASH. REV. CODE ANN. § 10.95.130(2)(b) (LexisNexis 2009) (enacted 1981). Although Florida and Utah have not enacted a statutory requirement, both states require proportionality review through case law. *See, e.g., Sinclair v. State*, 657 So. 2d 1138 (Fla. 1995); *State v. Lafferty*, 20 P.3d 342 (Utah 2001).

[4] Of the twenty states (including New York) that require, either through statute or case law, that state appellate courts conduct proportionality review of capital sentences, eight states compare the case at issue with the entire universe of similar capital-eligible cases – cases in which death was imposed *and* cases in which life was imposed. *See* N.Y. PENAL LAW § 470.30(3) (Consol. 2009) (enacted 1995); *see e.g., Cabrera v. State*, 840 A.2d 1256, 1274 (Del. 2004); *Crook v. State*, 908 So. 2d 350, 356-58 (Fla. 2005); *State v. Martin-Johnson*, 969 P.2d 925, 936 (Mont. 1998); *State v. Taylor*, 669 S.E.2d 239, 276-78 (N.C. 2008); *State v. Piper*, 709 N.W.2d 783, 800-01 (S.D. 2006); *State v. Rice*, 184 S.W.3d 646, 679 (Tenn. 2006); *In re Elmore*, 172 P.3d 335, 352 (Wash. 2007); *see also* Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1213 n.248 (2001).

[5] Of the twenty states (including New York) that require, either through statute or case law, that state appellate courts conduct proportionality review of capital sentences, eleven states compare the case at issue *only* to similar death-eligible cases in which death was imposed. *See e.g., McWhorter v. State*, 781 So. 2d 257, 330 (Ala. 1999); *Walker v. State*, 653 S.E.2d 439, 447-48 (Ga. 2007); *Epperson v. Commonwealth*, 197 S.W.3d 46, 63-64 (Ky. 2006); *State v. Holmes*, 5 So. 3d 42, 95-98 (La. 2008); *Knox v. State*, 901 So. 2d 1257, 1271 (Miss. 2005); *Lyons v. State*, 39 S.W.3d 32,44 (Mo. 2001); *State v. Gales*, 694 N.W.2d 124, 166 (Neb. 2005); *State v. Jackson*, 839 N.E.2d 362, 377 (Ohio 2006); *State v. Bowman*, 366 S.C. 485, 502 (S.C. 2005); *State v. Copeland*,

300 S.E.2d 63, 74 (S.C. 1982); *Lafferty*, 20 P.3d at 375-76; *Hudson v. Commonwealth*, 267 Va. 29 (Va. 2004) (stating that the pool of applicable cases includes cases in which life sentences were imposed, but only citing cases in which the death was imposed); *see also* Latzer, *supra* note 4, at 1212 n.246.

[6] *But see* Latzer, *supra* note 4, at 1212 n.246 (citing *State v. Ortiz*, 701 So. 2d 922, 936 (La. 1997), to support the proposition that, when conducting its proportionality review, the Louisiana Supreme Court evaluates death-eligible cases in which a life sentence was imposed). In *State v. Ortiz*, the Louisiana Supreme Court evaluated capital-eligible cases in which a life sentence was imposed because of the scarcity of such cases in which "murder for hire" was at issue. 701 So. 2d at, 936. The *Ortiz* case represents an aberration in the court's proportionality review practice. *See* Appellant's Application for Rehearing at 9, *State v. Holmes*, 5 So. 3d 42, 95-98 (La. 2008) (No. 2006-KA-2988)..

[7] *But see* Latzer, *supra* note 4, at 1213 n.248 (citing *Biondi v. State*, 699 P.2d 1062, 1066 (Nev. 1985), to support the proposition that, when conducting its proportionality review, the Nevada Supreme Court evaluates "all capital cases as well as appealed murder cases in which the death penalty was sought but not imposed"). Nevada repealed its statutory requirement for proportionality review in 1985, *see* Bienen, *supra* note 2, app. A, at 247, and its statute now only provides for an "excessiveness" review, *see* NEV. REV. STAT. § 177.055(2)(e) (2009).

[8] *But see* Latzer, *supra* note 4, at 1213 n. 248 (citing *Tichnell v. State*, 468 A.2d 1, 17 (Md. 1983), to support the proposition that, when conducting its proportionality review, the Maryland Supreme Court evaluates death-eligible cases in which a death sentence was imposed). Maryland repealed its statutory requirement for proportionality review in 1992, *see* Bienen, *supra* note 2, app. A, at 239, and its statute now only provides for consideration of aggravating and mitigating circumstances of the case at issue, *see* MD. CODE ANN., CRIM. LAW § 2-401 (LexisNexis 2008).

[9] New Hampshire's capital sentencing statute states that the New Hampshire Supreme Court will examine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," N.H. REV. STAT. ANN. § 630:5(XI)(c) (LexisNexis 2009); however, the court has yet to have an opportunity to interpret the statute. On December 18, 2008, a jury sentenced a man to death in New Hampshire for the first time in 50 years. *See* Katie Gonzalez, *N. H. Jury Imposes First Death Penalty in 50 Years*, DARTMOUTH.COM, http://thedartmouth.com/2009/01/29/news/jury/ (last visited June 1, 2009).

[10] When conducting its proportionality review, the Court of Appeals in New York has not limited its universe of comparison cases to penalty phase trials, but rather reviews all first-degree murder cases. *See* Bienen, *supra* note 2, at 218 n.320.

[11] Although Virginia has the mechanisms in place to compare a death sentence case to other death-eligible cases in which life was imposed, it routinely neglects to do so. *See* Jessie Seiden, Note, *Supreme Court of Virginia*: Hudson v. Commonwealth, 590 S.E.2d 362 (Va. 2004), 16 CAP. DEF. J. 529, 531 (2004) (stating that when a defendant fails to present mitigating evidence the court is essentially precluded from comparing the defendant in the particular case to defendants who received life sentences in similar cases); *but see Powell v. Commonwealth*, 267 Va. 107 (Va. 2004) (evaluating, as part of its proportionality review, two death-eligible cases in which a life sentence was imposed).

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(4)

No. 08-1358

In the Supreme Court of the United States

BRANDY HOLMES,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to Louisiana Supreme Court

BRIEF OF *AMICI* THE NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, THE NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, THE NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, ALONG WITH OTHER *AMICI*, ON BEHALF OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI* ON BEHALF OF THE NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE

Pursuant to Rule 37.2 of the Rules of this Court, the *National Center On Domestic And Sexual Violence*, the *National Coalition Against Domestic Violence*, *the National Clearinghouse For The Defense Of Battered Women*, along with other *Amici* move for leave to file the accompanying brief in support of the petition for a writ of *certiorari*. Counsel for petitioner has consented to the filing of this brief; counsel for respondent has denied consent.

Amici Curiae have especial expertise in the manifestation of domestic violence, and the unique dynamics that arise in situations of intimate partner violence. Further, *Amici* recognize the profound injustice that arises when courts fail to fully consider or appreciate the context of domestic violence.

Petitioner, Brandy Holmes, was a battered woman acting under the domination and influence of her co-defendant at the time of the offense for which she has been sentenced to death. The abuse she endured at the hands of her co-defendant dramatically mitigates her moral culpability and explains her willingness to take blame for the entire episode. The Louisiana Supreme Court's failure to consider this evidence in determining whether the death sentence imposed upon her was excessive, results in an arbitrary, disproportionate and fundamentally unjust punishment. Moreover it reflects a continued flaw in the administration of the capital punishment scheme.

Accordingly, counsel respectfully asks that this Court grant leave to undersigned *Amici* to file the attached brief of *Amici Curiae*.

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INTEREST OF THE *AMICI CURIAE*[1]

The *National Center on Domestic and Sexual Violence* addresses domestic and sexual violence, seeking to educate policy makers, including the courts, about the impact of domestic and sexual violence, and challenge potential outcomes that tend to blame or re-victimize survivors of domestic and sexual violence.

The *National Coalition Against Domestic Violence* (NCADV) provides training, public policy advocacy, and support to a network of over 2,000 local programs and state coalitions serving victims of domestic violence. NCADV also works to educate policy makers, including the courts, about the serious nature of domestic abuse and coercive control.

The *National Clearinghouse for the Defense of Battered Women* works to ensure justice for battered women charged with crimes, where a history of abuse is relevant to the woman's legal claim or defense. The National Clearinghouse provides technical expertise to battered women defendants, defense attorneys, battered women's advocates, expert witnesses, and others. The National

[1] Pursuant to Rule 37.3, a letter of consent from petitioner to the filing of this brief has been lodged with the Clerk of the Court. As a result of respondent's refusal to grant consent to the filing of this brief, a motion for leave to file this amicus is attached to this brief. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to this brief.

Clearinghouse works on a wide variety of cases, including those in which the history of abuse helps explain behavior, reduce culpability and/or mitigate punishment.

The *Victim Rights Law Center* (VRLC) provides legal representation to victims of rape and sexual assault, and promotes a national movement committed to seeking justice for every rape and sexual assault victim. The VRLC meets its mission this through direct representation of victims and national legal advocacy, training and education.

The *Women's Law Project* is dedicated to improving the legal and economic status of women and their families. Guided by principles of equality and justice for all women, the Law Project engages in high-impact litigation, public policy advocacy, public education, and individual counseling.

The University of Texas School of Law Domestic Violence Clinic's mission is to provide comprehensive legal services to indigent domestic violence victims and collaborate with community agencies to improve victim safety and offender accountability. The University of Texas School of Law Domestic Violence Clinic provided the essential support and resources necessary to draft this Brief.

STATEMENT OF THE CASE

Brandy Holmes's childhood, adolescence and early adulthood – in the words of this Court in *Kennedy v. Louisiana* – "cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror."[2] Named after her mother's favorite drink, Brandy was born with the scars from a pregnancy awash in alcohol. From the earliest of ages, she had a greater need, but diminished capacity to protect herself.

When she was with her mother, Brandy was exposed to alcoholism and drug addiction. When she was with her father, he and other adults in the home sexually abused her.[3] At the age of 12, she was

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[2] *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) (observing "Rape has a permanent psychological, emotional, and sometimes physical impact on the child. . . . We cannot dismiss the years of long anguish that must be endured by the victim of child rape.") (internal citations omitted); *see id.* at 2676-77, (Alito, J., dissenting) ("'Long-term studies show that sexual abuse is 'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate.'") (internal citations omitted). *See also Kennedy v. Louisiana*, 07-343, *Brief of Texas, et al.*, (noting "'Child sexual abuse also can play a major role in shaping the future sex criminal' and 'sexual revictimization' of the victim") (internal citations omitted).

[3] Many father-daughter incest victims are at risk for being in abusive relationships later, especially if they have not received counseling or other assistance in dealing with the attendant trauma. *See* Judith Herman, FATHER-DAUGHTER INCEST 92-94 (Harvard University Press 1981)(reporting that in order to flee the abuse, many incest victims are forced to leave home at young age, yet are often ill- equipped to strike out on their own and such limitations make them "vulnerable to entering

raped. R. 4161, 4166-67. After the rape, Brandy refused to eat in an attempt to starve herself to death. She was then committed to a psychiatric hospital in Mississippi. R. at 2348, CD of Juvenile Records at 1235-40.[4]

When she was released from juvenile and adult facilities, Brandy was easy prey for the older Robert

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another abusive relationship."). When the child sexual abuse involves a father's betrayal, there is likely a sense of "simultaneous entrapment and helplessness (i.e., the prototypical family violence and/or incest scenario) . . .[which]interferes with normal child development." Judith L. Alpert, *et al.*, *Symptomatic Clients and Memories of Childhood Abuse, What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 PSYCHOL. PUB. POL'Y & L. 941, 968 (1998).

[4] The State of Louisiana attempted to minimize this rape by suggesting that it involved consensual sex. R.at 6101-02, 6234. This is an unwieldy allegation, as the Louisiana legislature subsequently rendered oral, vaginal or anal intercourse with a child twelve years old or younger a capital offense, and indeed the very agency that prosecuted this case secured one of the two capital verdicts for non-homicide offenses. *See State v. Richard Davis*, 995 So. 2d 1211, 1212 (La. 2008) (observing that based upon *Kennedy v. Louisiana* "we are constrained to set aside defendant's death sentence and to remand the case to the First Judicial District Court for the resentencing of defendant to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence."). Consent is not, and was not, a defense to the charge of rape for sexual intercourse with a child under the age of 13. Regardless of this, the notion that this rape was consensual is largely contradicted by the psychiatric evidence indicating that Brandy was thereafter diagnosed with Post Traumatic Stress Disorder (PTSD) and Major Depression, diagnoses that were consistent from 1992 through a pretrial court-ordered expert evaluation performed in 2005. R. at 6125 (Testimony of Vigen); R. at 2363, (Competency Evaluation performed by George Seiden, M.D.)(hereinafter Seiden).

Coleman.[5] Coleman was not only chronologically older (Brandy was 23, Coleman was 33 at the time of the offense), but also was light-years ahead in terms of maturity (Brandy functioned at an age-equivalent of 9 -13).

Ms. Holmes relationship with Coleman was characterized by severe manipulation and abuse. The psychiatrist who examined Brandy and interviewed family members offered uncontroverted testimony that Brandy operated under the domination of Coleman.

Witnesses recounted seeing Coleman inflict physical, sexual, psychological, and verbal abuse upon Ms. Holmes. R. at 1297–1301. Coleman's abusive behavior[6] established a pattern of control, punctuated by physical violence against Ms. Holmes that served to keep her in an ongoing state of fear.

Ms. Holmes reported that when he was jealous, Robert Coleman had beaten her and "put a gun to her head". *Id.* Coleman had also beaten Ms. Holmes to prevent her from going to visit others, leaving

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[5] Ms. Holmes was ultimately charged along with Robert Coleman with the capital murder at issue in this case.

[6] *Amici* use various terms such as intimate partner violence, domestic violence, abuse, and battering to describe the violent, abusive and controlling behaviors of Coleman against Ms. Holmes. Such terms are not meant to describe distinct phenomenon; rather they are used interchangeably to refer to "the broad range of behaviors considered to be violent and abusive within an intimate relationship." Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1204 (1993) (discussing terms used in social science literature on intimate partner violence).

visible bruises and scratches observed by her mother and sister. R. at 1302–03.

Coleman also inflicted brutal violence on other women, such as Ashley Shantell Harvey, in Ms. Holmes's presence. This violence ranged from kidnapping and beatings to rapes and humiliating forced sex with others. R. at 2256 (detailing Coleman's kidnapping, beatings, sodomy, and vaginal and anal rapes by him as well as those with whom he ordered her to engage). Coleman also repeatedly ordered Ms. Holmes to engage in sex with Ashley Shantell Harvey, against the wishes of both women. R. at 1253.

At times, Brandy tried to leave Coleman. However, because he threatened her with violence she stayed. R. at 4164-65. Coleman's beatings were linked to his desire to dominate Brandy, keeping her in the home and beating her if she left for even short periods of time without his explicit permission, thus obviating the need to repeatedly forbid her from leaving him permanently. Ms. Holmes told people that she was afraid of Robert, that he was "really crazy," and that if she tried to leave, he would find her. R. at 1253 (Statement taken by CPSO Det. Kay Ward, Don Ashley, 1-29-03).

Coleman's violent reactions and threats against Ms. Holmes and others helped him "set the stage" to coerce and control her. His demonstrated brutality conveyed the message that his threats were credible. He took full advantage of Holmes's lack of tangible and personal resources with which to resist his control. *See* Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 748 (2005) (explaining how batterers set the stage to "prime" the victim for coercion). Coleman also

fostered Ms. Holmes's emotional attachment to him, a function of both her love interest and her ever-present fear of his violence. *See* Dutton, *supra* note6, at 1224. His ongoing threat of harm increased her sense of worthlessness and social isolation, in essence "forcing" a dependency that cemented her emotional bond to him. *See id.* at 1224-25.

Coleman, typical of an abuser seeking coercive control, framed his abuse within the rubric of care and love. As a batterer, Coleman instilled within Ms. Holmes a sense of her own worthlessness – which gave him permission to beat and terrorize her; he also instilled within Ms. Holmes the sense that his abuse was inexorably connected to his love. The traumatic effects of ongoing abuse within this context manifest in immediate cognitive, behavioral and emotional responses that may interfere with the victim's ability to accurately assess her own safety. Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 748 (2005). In a pattern that is not unusual for battered women,[7] Brandy Holmes defended her abuser, protected him, and lied on his behalf. As a result, when Ms. Holmes's family asked about the source of her bruises and scratches, she attributed them to Robert Coleman's jealousy, but went no further for fear of exposing and enraging him.

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[7] The great majority of victims of serious domestic violence and sexual assault are women. In over 90% of the violence by intimates recorded in the National Crime Victimization Survey from 1987 to 1991, the victim was female. Bureau of Justice Statistics, Violence Between Intimates, NCJ-149259 (DoJ, Nov. 1994).

Consistent with the experiences of many battered women, when Holmes and Coleman were charged with capital murder, Holmes attempted to exonerate her abuser by claiming that she alone had committed the murder. [8]

Even the Assistant District Attorney who prosecuted this capital case expressed concern that Brandy had minimized the role that her boyfriend had played in the murder, attempting to take blame for the action of her abuser:

> Assistant Caddo Parish District Attorney Hugo Holland was interviewed concerning this report. It is his opinion that Robert Coleman may have played a more significant role in the instant offense than Brandy Holmes related to detectives. Certain forensic evidence at the scene leads Mr. Holland to believe that Robert Coleman could have been the murderer of Mr. Brandon and possibly could have shot him upon first entering the residence. Mr. Holland maintains that, because of several conflicting stories given by Holmes to interviewers, it probably will never be known who did exactly what in the Brandons' residence on the date of the murder and attempted murder. . . . Mr. Holland related that he believes Holmes'

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[8] *Cf. McMaugh v. State*, 612 A.2d 725, 733-34 (R.I. 1992) (post-conviction relief granted where battered woman defendant, convicted with abusive husband codefendant of murdering a third person, had been coerced by him into giving false accounts of the incident favorable to him, as a result of his "domination through a focused pattern of extreme physical and mental abuse.")

> personality is one that would exhibit tendencies to cover for and/or make excuses for an individual that she cared for, namely Robert Coleman.

First Sentence Investigation Report, at 5-6.[9] The Sentence Investigation Report further observed:

> While speaking with a female detective in one interview, Holmes asked the detective if she had ever loved someone so much that she would do anything in the world for him. The detective then asked if the subject was referring to Robert Coleman, and Holmes replied that she was.

Id.

Ms. Holmes's admissions to the offense are also consistent with her efforts to protect Robert Coleman; at no time in these statements does she state that Coleman took part in the shooting or stabbing, despite the fact that testing revealed high velocity blood spatter on his clothes.

The abuse suffered at the hands of Robert Coleman, is relevant not merely to Ms. Holmes's suffering, but also essential to an understanding of the ongoing dynamics of their relationship: – both Ms. Holmes's inability to leave, and her desire to protect her abuser – are of a complexity beyond the understanding of many lay-persons.

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[9] These comments were withdrawn from a subsequent version of the State's response to a Uniform Capital Sentence Report.

SUMMARY OF ARGUMENT

Robert Coleman raped, beat, and demeaned his co-defendant – petitioner in this case – Brandy Holmes. Yet the Louisiana Supreme Court did not consider Coleman's abuse of Ms. Holmes in assessing whether her death sentence was excessive. The Louisiana Supreme Court's failure to consider chronic domestic abuse as unique mitigating evidence violates the Eighth Amendment to the United States Constitution.

Meaningful appellate review is essential to ensure that defendants who are not categorically exempt from capital punishment, but nonetheless have diminished or limited moral culpability, are not subjected to the death penalty. This review is particularly necessary where the factor that renders the defendant less culpable, such as the psychological trauma that arises from sexual and domestic abuse, is one that juries are prone to minimize, misunderstand or mistakenly view as aggravating. *Cf. Atkins v. Virginia*, 536 U.S. 304, 320-21 (2002) ("The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' . . . is enhanced . . . by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation. . . . "). As this Court made clear concerning individuals with mental retardation, reliance on evidence that a battered woman is susceptible to defend, excuse or assist her batterer "as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Id.* at 321.

Amici do not seek a categorical exemption from capital punishment for survivors of sexual and domestic violence. *Cf. Atkins*, 536 U.S. at 320-21 (barring execution of mentally retarded individuals); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring execution of individuals who commit capital crimes when under the age of 18); *Kennedy*, 128 S. Ct. 2641 (barring execution of individuals who commit crimes (not against the state) that do not result in the death of the victim). Instead, *Amici* ask the Court to reaffirm that meaningful appellate review is an essential component to ensure that arbitrary, capricious, and discriminatory death sentences are not carried out. Consideration of the extensive mitigating issues presented by this case is essential to a constitutionally acceptable operation of capital punishment. Domestic violence is manifestly relevant to moral culpability. *See* Victor Streib, *Death Penalty for Battered Women*, 20 FLA. ST. U.L. REV. 163, 186 (1993) (noting review of cases involving women sentenced to death and executed "suggests two broad categories of battered women who may face the death penalty – women who kill their batterers and women who kill others to please or in concert with their batterers."). Streib notes that consideration of "Battered Women's Syndrome" or "Intimate Personal Violence" may be misunderstood by jurors, prosecutors and defense counsel. *Id.* Courts simply cannot guarantee that death sentences are not excessive unless evidence that the defendant was the victim of domestic violence is properly considered as a factor that could decrease her culpability.

Although the Louisiana capital punishment scheme identifies as mitigating the fact that "the offense was committed while the offender was under

the influence or domination of another person," LA. CODE CRIM. PROC. ANN. art. 905.5(c), the Court failed to ensure that the complex realities of domestic violence were considered in determining whether Ms. Holmes should live or die. *See* Victor Strieb, *Death Penalty for Battered Women*, 20 FLA. ST. U.L. REV. 163, 186 (1993) ("[B]attered women who kill third-party, completely 'innocent' victims nonetheless have a unique partial explanation for their otherwise unfathomable acts."). In failing to carry out its obligation to review the record to ensure that the death penalty was reserved for the most culpable defendant, the Louisiana Supreme Court dedicated only a half sentence to observe that Ms. Holmes had been raped at the age of twelve, and omitted entirely from its consideration that Ms. Holmes was the victim of sexual and domestic violence perpetrated by her co-defendant boyfriend.

ARGUMENT

I. MEANINGFUL CONSIDERATION OF MITIGATING CIRCUMSTANCES IS ESSENTIAL TO AN ACCURATE DETERMINATION OF WHETHER A DEATH SENTENCE IS ARBITRARY, EXCESSIVE, OR DISPROPORTIONATE.

Meaningful appellate review is essential to ensure that capital punishment is reserved for the most culpable capital defendants. In the "not all together satisfactory"[10] effort to ensure both consistency and decency in the application of capital punishment, this Court has considered meaningful appellate review an essential component of the structure designed to avoid arbitrary, discriminatory or excessive death sentences. *See Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[T]he further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."); *id.* at 206 ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.");

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[10] *See Kennedy*, 128 S. Ct. at 2658-59 ("It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment . . . The tension between general rules and case-specific circumstances has produced results not all together satisfactory.").

id. at 211 ("An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review."); *Zant v. Stephens*, 462 U.S. 862 (1983) (noting the role of the automatic appeal to preclude arbitrary imposition of the death penalty).

This Court's opinion in *Pulley v. Harris*, was interpreted by a number of state courts to relieve them of the obligation to conduct such review. 465 U.S. 37 (1984). *See State v. Holmes*, 5 So. 3d 42, 96 (La. 2008) (asserting that proportionality review was no longer required by federal law). More recently, Justice Stevens' statement respecting the denial of *certiorari* in *Walker v. Georgia* observed that *Pulley v. Harris* was "not meant to undermine our conclusion in *Gregg* and *Zant* that such review is an important component of the Georgia scheme." *Walker v. Georgia*, 129 S. Ct. 453, 456 (2008) (Stevens' statement concerning denial of *certiorari*).

Ms. Holmes's *Petition for Certiorari*, and other amicus briefs ably articulate the legal premise that dictates the need for meaningful appellate review of mitigating circumstances, especially in states that operate under the *Gregg v. Georgia* model of death penalty schemes, to ensure that a sentence of death is not arbitrary, excessive, or disproportionate.

This brief addresses more particularly why meaningful appellate review is necessary to consider and give meaning to enduring battering and its effects,[11] including sexual and domestic violence, as a mitigating circumstance.

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[11] *Amici* use the term "battering and its effects" to describe the substance of expert testimony regarding abuse. Such evidence is often referred to as "battered woman syndrome" evidence, an idea first conceptualized in the late 1970s and coined as a term by psychologist Lenore Walker in the early 1980s. *See* Lenore

II. ENDURING SEXUAL AND DOMESTIC VIOLENCE IS A SIGNIFICANT MITIGATING CIRCUMSTANCE THAT IS OFTEN MISUNDERSTOOD BY THE SENTENCER.

Evidence concerning sexual and domestic violence is an extremely significant mitigating circumstance often misunderstood by juries. While evidence of enduring sexual and physical violence is profoundly mitigating, laypeople often erroneously discount complaints of domestic abuse based largely on myths about battered women. Among the most common myths are that no woman would stay in a relationship if the abuse was as bad as she claims; that battered women are "free to leave" the relationship; and that battered women brought the abuse on themselves and are to blame.[12]

E. Walker, THE BATTERED WOMAN (Harper Collins 1979) and Lenore E. Walker, THE BATTERED WOMAN SYNDROME (Springer Publishing Company 1984). For a complete discussion of the movement away from the "syndrome" term and toward the language used by *Amici*, *see* Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony On Battering and Its Effects*, *in* CURRENT CONTROVERSIES IN FAMILY VIOLENCE 228-230 (Loseke, Gelles & Cavanaugh, eds. 2005).

[12] *See* Diane R. Follingstad, Margaret M. Runge, April Ace, Robert Buzan & Cindy Helff, *Justifiability, Sympathy Level, and Internal/External Locus of the Reasons Battered Women Remain in Abusive Relationships*, 16 Violence and Victims 621, 622 (2001) ("[L]ay persons often search for explanations as to why the woman stays in the abusive relationship...they may actually view her decision to stay in the relationship as an explanation for her victimization."); Charles Patrick Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities Abuse the Myths*, 2 JOURNAL OF FAMILY VIOLENCE 257, 263 (1987) ("a substantial proportion of the public (from which

Moreover, while some laypeople may understand the impact of domestic abuse when a battered woman murders her abusive partner in self-defense, they often cannot grasp the dynamics when a battered woman acts in concert with, or even defends her abuser. Because laypersons often do not understand the dynamics that arise within a domestic violence setting, presenting such evidence runs the risk of prompting the jury to believe that the accused is guilty of fabrication and manipulation.

In a number of instances, this Court has instituted categorical exemptions from imposition of the death penalty based, in part, upon the inability of juries to fully apperceive and give appropriate meaning to, powerful mitigation.[13] Although some authorities have called for complete exemption from the death penalty for victims of domestic violence

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juries are drawn) . . . apparently believe that a battered woman can 'simply leave' her batterer."); *see also* Tracy Bennett Herbert, Roxane Cohen Silver & John H. Ellard, *Coping with an Abusive Relationship: How and Why do Women Stay?*, 53 JOURNAL OF MARRIAGE AND THE FAMILY 311 (1991).

[13] For example, in *Atkins v. Virginia* this Court noted that one of the justifications for exempting individuals with mental retardation from execution was that evidence of mental retardation could be misunderstood or misconstrued, and as such was "a two-edged sword" that could enhance the risk of execution. 536 U.S. 304, 321 (2002). Similarly, in *Simmons*, this Court observed that merely permitting the jury to weigh a defendant's youth as mitigating circumstance was insufficient "as the prosecutor argued Simmons' youth was aggravating rather than mitigating." *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

and abuse, *see* Victor Streib, *Death Penalty for Battered Women*, 20 FLA. ST. U.L. REV. 163, 186 (1993), *Amici* in this instance suggest that meaningful appellate review may be constitutionally necessary to ensure that 'the law's most severe penalty' is not 'imposed on one whose culpability or blameworthiness is diminished' by experiences of severe emotional, physical, and sexual abuse.

A. *Enduring Domestic Violence Has Particular Mitigating Significance*

Enduring domestic violence[14] is akin to torture. In addition to the physical harm, there is severe traumatizing as a psychological component. In *Giles v. California*, Justice Scalia, for the majority, insightfully explained, "Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions." 128 S. Ct. 2678, 2693 (2008).

Ongoing abuse creates extreme power imbalances in which the batterer retains excessive influence and control. *See* Evan Stark, *Commentary*

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[14] Domestic violence is now understood as continuous harm experienced in at least five areas of victims' lives: 1) recognized threat; 2) coping; 3) changed identity; 4) entrapment, and 5) disempowerment. Paige Hall-Smith, *et al.*, *Women's Experiences With Battering: A Conceptualization From Qualitative Research*, 5 WOMEN'S HEALTH ISSUES 173 (1990); Paige Hall-Smith, *et al.*, *Measured Battering: Development of the Women's Experience With Battering (WEB) Scale*, 1 WOMEN'S HEALTH: RESEARCH ON GENDER, BEHAVIOR AND POLICY 273 (1995).

on Johnson's "Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence," 12 VIOLENCE AGAINST WOMEN 1019, 1019-1025 (2006)(criticizing definition of battering based on specific incidents of violence and focusing instead on "[d]efining battering as a form of subordination rather than violence.").

This conception of domestic violence includes not simply physical harm, but an understanding of accompanied psychological imprisonment. The perpetrator's pattern of structural controls has a cumulative, negative impact essentially blind-siding the victim. Evan Stark, Coercive CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE (Oxford University Press 2007).

Social scientists have long understood intimate partner violence as part of "strategy used to subjugate the victim for the gain of the abuser." Michael A. Anderson, *et al.*, *"Why Doesn't She Just Leave?": A Descriptive Study of Victim Reported Impediments to Her Safety*, 18 JOURNAL OF FAMILY VIOLENCE 151 (2003). Dominance is achieved not through discrete acts of violence, but rather through a pattern of coercive tactics that keep the victim in a "state of siege."[15] Consistent with these dynamics, Coleman's physical violence against Ms. Holmes was

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[15] Dutton, *Understanding Women's Responses to Domestic Violence, supra* note 6, at 1208. ; *see also Hernandez v. Ashcroft*, 345 F.3d 824, 837 (9th Cir. 2003) ("The effects of psychological abuse, coercive behavior, and the ensuing dynamics of power and control mean that 'the pattern of violence and abuse can be viewed as a single and continuing entity.'") (internal citations omitted).

just one tool among many others, such as isolation, humiliation, and emotional abuse.

Ms. Holmes was not only the target of severe abuse by Robert Coleman, but also witnessed his brutal violence against others. Ms. Holmes no doubt internalized this reality. The net effect kept Ms. Holmes in a chronic state of psychological entrapment and terror. Robert Coleman's physical, emotional, and financial abuse of Brandy Holmes further exacerbated pre-existing traumas and effectively eliminated her resistance to him and to his unlawful activities.[16]

Indeed, Ms. Holmes's experience as a victim of rape and physical assault as a child rendered her especially vulnerable to victimization as an adult. William W. Harris, *et al.*, *In the Best Interests of Society*, 48 J. OF CHILD PSYCHOLOGY AND PSYCHIATRY 392 (2007) (reporting that "[C]hildren's responses to trauma can render them simultaneously over-reactive, helpless and immobilized – whether as victims of abuse [or] witnesses to domestic and community violence. . . with the potential for long-lasting changes in brain anatomy and physiology.").

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[16] An individual's vulnerabilities – ranging from substance abuse and mental health problems, to childhood abuse and neglect – can dramatically raise the risk that a person will become the victim of abuse or control. *See* Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743 (2005) (discussing "creating or exploiting vulnerabilities"); D. G. Kilpatrick, *et al.*, 1997, *A Two Year Longitudinal Analysis of the Relationship Between Violent Assault and Alcohol and Drug Use in Women*, 65 JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY 834, 834-847 (1997).

B. *Meaningful Appellate Review of Evidence Is Essential Because Jurors Often Fail to Understand the Complex Realities Faced by Victims of Intimate Partner Violence and Their Psycho-Social Responses to the Victimization*

In assessing whether a defendant, such as Brandy Holmes, warrants the most severe punishment, laypersons are often ill-equipped to measure the significance of domestic violence. Courts have recognized that understanding the impact and psychological complexity of intimate partner violence is beyond the ken of ordinary jurors.[17] Scholarly literature confirms that laypersons have many misconceptions about domestic violence that interfere with their ability to accurately understand it. These misconceptions include, for example: that battered women can easily leave their situations, and that women are responsible for their failure to leave,[18] that battering

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[17] The body of jurisprudence accepting psychological expert testimony on battering is founded on the notion that ordinary citizens do not understand or appreciate the psychological complexity of domestic abuse. *See Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989) (where defendant raised self-defense claim and presented expert testimony explaining battered women's syndrome, jury could utilize expert's testimony to assess how 'a reasonably prudent battered woman' would have reacted); *People v. Wilson*, 487 N.W.2d 822 (Mich. Ct. App. 1992) (noting prosecutor's inference that defendant should and could have left relationship if abusive, and that understanding of battered spouse syndrome was generally outside the realm of common appreciation); *see also Dando v. Yukins*, 461 F.3d 791, 801 (6th Cir. Mich. 2006).

[18] Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991);

is a series of discrete events rather than a continuing state of siege,[19] that battered women are passive and meek,[20] and that battered women are blameworthy.[21] Unfortunately, despite the best public education efforts of groups like *Amici*, research confirms that these and other misconceptions about battered women persist to this day.[22] Many of these misconceptions are based on the incorrect assumption that all battered women fit (or should fit) a particular profile. In reality, battered women face diverse circumstances, and employ an array of strategies for coping with abuse, all of which may help explain a woman's behavior in a particular situation.[23]

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see also Regina A. Schuller, *et al.*, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCH. 316 (1994).

[19] Dutton, *Understanding Women's Responses to Domestic Violence*, *supra*, at 1208; *see also* Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALBERTA. L.REV. 973, 980-81 (1995).

[20] Mahoney, *supra* note 18, at 44.

[21] Elizabeth M. Schneider, *Equal Rights to Trial for Women*, 15 HARV. C.R.-C.L. L. REV. 623, 625 (1980); *State v. Hodges*, 716 P.2d 563, 567 (Kan. 1986); *State v. Kelly*, 478 A.2d 364, 370 (1984).

[22] For example, research shows that laypersons still differ significantly from experts in their understanding of domestic violence. Regina A. Schuller, *et al.*, *Jurors' Decisions in Trials of Battered Women Who Kill: The Role of Prior Beliefs and Expert Testimony*, 24 J. APPLIED SOC. PSYCH. 316 (1994).

[23] Dutton, *Understanding Women's Responses to Domestic Violence*, *supra*, at 1196, 1225-30; Jill Davies, *et al.*, SAFETY

Mistaken assumptions about a battered woman's experiences often lead to unjustified conclusions about her credibility. For example, complaints of abuse may be viewed as exaggerated or even fabricated, based on the flawed reasoning that "if it was really that bad" she would have done something, such as left the batterer, sought medical treatment or called police. Because she did not do these things, the reasoning goes, she must necessarily be lying about the extent or even the existence of the abuse.

A battered woman's failure to leave, or effort to help her batterer, may lead to the baseless conclusion that by "staying," or defending her batterer she approves of what he does, or willingly agrees to act in concert with him. This is particularly relevant when the batterer engages in criminal conduct. These mistaken assumptions about battered women's experiences, typical among laypersons, ignore the complex realities of the lives of victims of intimate partner violence. The truth is that battered women's behaviors cannot be reduced to a simple dichotomy, such as leaving or staying. Rather, battered women's behaviors reflect the diverse strategies they use to try to reduce the violence or prevent it from getting worse.[24] What may appear to be tolerating or even inviting more abuse may well be a means of coping with ongoing violence.

PLANNING WITH BATTERED WOMEN: COMPLEX LIVES/DIFFICULT CHOICES 78 (Sage Publications 1998).

[24] *See* Dutton, *supra*.

In particular, coping strategies of compliance and defense of the perpetrator may seem illogical to outsiders. In fact, these are well-known responses to intimate violence. Such behaviors cannot be evaluated apart from the context of the power imbalance in the relationship. In that context, compliant behaviors cannot be assumed to signal approval of the conduct of the batterer, or willingness to participate.

Intimate partner violence is fundamentally about domination and influence. The pattern of coercive tactics operates to convey the batterer's demands to the victim as well as the genuineness of making good on his threats for noncompliance. Mary Ann Dutton & Lisa Goodman, *Coercion in Intimate Partner Violence: Toward a New Conceptualization*, 52 SEX ROLES 743, 743-47 (2005). In this way, the batterer can subvert her will to his, even without laying a hand on her, at any given time. By exerting ongoing control over her decisions, choices and ultimately, her actions, the batterer can keep his victim as "personally entrapped" as if he was physically restraining her even when she appears safe or free from her batterer. Stark, *supra*.

III. WITHOUT MEANINGFUL APPELLATE REVIEW, THERE IS A HEIGHTENED RISK OF ARBITRARY AND CAPRICIOUS DEATH SENTENCES.

This case demonstrates the re-emergence of a pre-*Furman*-like state of capricious imposition of the death penalty. This level of arbitrariness tracks the failure of the *Gregg*-precautions after state courts

began to interpret *Pulley v. Harris* as permission to rubber-stamp any imposition of the death penalty.

The Louisiana Supreme Court upheld the death sentence imposed upon Ms. Holmes, despite acknowledging that it could not determine whether Ms. Holmes or her co-defendant was primarily responsible for the offense. *State v. Holmes*, 5 So. 3d at 63-64. It upheld the exclusion of evidence concerning a jury's determination that her co-defendant Robert Coleman deserved a sentence of death, and failed entirely to consider the inequity that arose when Coleman received a new trial based upon errors during jury selection.

In its assessment of whether the death penalty was excessive, the Louisiana Supreme Court did not consider evidence within the record indicating that Brandy Holmes was the victim-survivor of debilitating abuse at the hands of her father, within the mental institution she was placed as a troubled adolescent, and ultimately at the hands of Robert Coleman.

Without this careful review by the Louisiana Supreme Court, this case signals a retrenchment to the pre-*Furman* arbitrary imposition of the death penalty.

CONCLUSION

For the foregoing reasons, *Amici* respectfully suggests that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

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No. 08-1358
(CAPITAL CASE)

IN THE

Supreme Court of the United States

BRANDY AILEEN HOLMES,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE NATIONAL ORGANIZATION ON FETAL ALCOHOL SYNDROME AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the National Organization on Fetal Alcohol Syndrome ("NOFAS" or "*amicus*"), moves for leave to file the accompanying brief as *amici curiae* in support of the petition for writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has denied consent.

Amicus curiae, NOFAS, a 501(c)(3) non-profit public health advocacy organization that strives to raise awareness of the risks associated with alcohol consumption during pregnancy and to support individuals and families living with Fetal Alcohol Syndrome ("FAS"), has a strong institutional interest in having

the Court resolve the issues raised by petitioner concerning whether FAS, which causes a lack of significant adaptive functions, should be considered in addition to IQ score as a mitigating circumstance in Louisiana's death penalty sentencing. NOFAS is not aware of any other FAS cases that have been reviewed by the Court. Accordingly, NOFAS should be granted leave to file the attached *amicus curiae* brief, which establishes the need for review by this Court by demonstrating the deficiencies in Louisiana's death penalty sentencing guidelines insofar as they fail to take FAS into account as a mitigating factor.

Respectfully submitted,

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BRIEF FOR THE NATIONAL ORGANIZATION ON FETAL ALCOHOL SYNDROME AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The National Organization on Fetal Alcohol Syndrome ("NOFAS") is a 501 (c)(3) non-profit public health advocacy organization committed to raising the awareness of the risks associated with alcohol

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

consumption during pregnancy and supporting individuals and families living with Fetal Alcohol Syndrome (or "FAS"). NOFAS represents children and adults seeking medical, mental health, education, rehabilitative and other therapeutic services for the spectrum of effects associated with prenatal alcohol exposure. FAS is the leading known preventable cause of intellectual disabilities and neurobehavioral disorders in the developed world affecting as many as 40,000 newborns each year in the United States alone.

Petitioner Brandy Holmes ("Ms. Holmes"), exhibits the hallmark developmental profile of FAS. Although her case is an extreme example of the maladaptive behavior linked to FAS, 61% of adolescents and 58% of adults with the disorder encounter the justice system. Twenty-three percent are ultimately confined in a mental hospital and 35% are incarcerated for a crime. Accordingly, NOFAS believes it is extremely important that law enforcement officials, the courts and corrections officers are educated about FAS, and that the disability be appropriately considered during sentencing and confinement. This case has important implications for understanding the personality and conduct disorders associated with FAS-induced brain damage, the vulnerabilities of affected individuals, the opportunities for intervention across systems of care, and the ultimate consequences of FAS in society. Ms. Holmes' case also has profound implications within the FAS field, and beyond, regarding the standards of decency for the treatment of the functionally disabled.

SUMMARY OF ARGUMENT

This Court should accept the petition for a writ of certiorari to review the Louisiana Supreme Court's

judgment in this case because that court's proportionality review failed to consider a necessary mitigating factor. Ms. Holmes suffers from Fetal Alcohol Syndrome, a condition which should have been weighed heavily as a mitigating circumstance in determining whether her death sentence is appropriate. Ms. Holmes' neurodevelopmental, cognitive and adaptive functioning deficits resulting from FAS were not adequately considered as mitigating circumstances. Further, the Louisiana Supreme Court failed to adequately consider Ms. Holmes' disabilities, caused by Fetal Alcohol Syndrome in conjunction with her low IQ, in upholding her death sentence. Finally, the portrayal of Ms. Holmes' behavioral manifestations of Fetal Alcohol Syndrome as aggravating circumstances precluded the necessary consideration of Fetal Alcohol Syndrome as a mitigating circumstance. This result is inconsistent with the rationale of the Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

ARGUMENT

THE LOUISIANA SUPREME COURT'S PROPORTIONALITY REVIEW FAILED TO CONSIDER FETAL ALCOHOL SYNDROME AS A MITIGATING CIRCUMSTANCE IN DETERMINING WHETHER MS. HOLMES' DEATH SENTENCE IS APPROPRIATE.

This case presents an opportunity for this Court to address whether the FAS population faces special risks of wrongful execution, similar to those faced by the mentally retarded population addressed by this Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). Ms. Holmes was sentenced to death because FAS was not considered a mitigating factor similar to mental

retardation. In *Atkins*, this Court held that the execution of mentally retarded individuals violates the Eighth Amendment's prohibition against cruel and unusual punishment:

> Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants.

Id. at 306-307. The *Atkins* decision was based upon a recognition of the longstanding principle that the death penalty is reserved for those most deserving of the most extreme and final punishment. 536 U.S. at 319 (citing *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing death sentence because defendant's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder")). In light of *Atkins*, those suffering from disabilities in areas of reasoning, judgment and impulse control cannot be seen as "deserving" of the death penalty.

A. The Neurodevelopmental Deficits Associated With Prenatal Alcohol Exposure And Fetal Alcohol Syndrome, And The Resulting Deficits In Cognitive And Adaptive Functioning, Should Have Been Considered As Mitigating Circumstances In Determining Whether Ms. Holmes' Death Sentence Is Appropriate.

The Louisiana Supreme Court's judgment in this case disregarded the clear fact that Ms. Holmes

suffers from Fetal Alcohol Syndrome and that fact should have been a mitigating factor. Notably, at trial, the State conceded that Ms. Holmes suffers from FAS. Tr. Feb. 16, 2006, 177:1-3. FAS is the most extreme form of a range of conditions within Fetal Alcohol Spectrum Disorder ("FASD"), a term used to describe the adverse effects of prenatal alcohol exposure that lie along a continuum.[2] These effects may include changes in facial features, organic brain damage, and deficits in cognitive and adaptive functioning that have lifelong implications.[3] The terms FAS and FASD are sometimes used interchangeably.[4] Ms. Holmes has been clinically diagnosed as having physical and organic brain changes, and cognitive and adaptive functioning deficits, consistent with those of FAS.

A diagnosis of FAS requires the presence of the following: 1) prenatal exposure to alcohol, 2) characteristic facial features demonstrating craniofacial anomalies (short palpebral fissures [smaller than normal eye openings], a smooth philtrum [ridges just above the middle of the upper lip] and a thin vermillion border of the upper lip), 3) prenatal or postnatal growth retardation, and 4) central nervous system dysfunction, commonly called "organic brain damage."[5]

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[2] *See* National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, Department of Health and Human Services, *Fetal Alcohol Syndrome Guidelines for Referral and Diagnosis*, (July 2004).

[3] *Id.* at 1.

[4] *Id.*

[5] Timothy E. Moore, et al., *Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System*, 19 Criminal Reports 99-106 (July 2004).

It is undisputed that Ms. Holmes was exposed to large amounts of alcohol in utero from the earliest stages of fetal development and during all three trimesters of her mother's pregnancy. Tr. Feb. 16, 2006, 10:2-4, 17-19. Her mother testified that she drank heavily throughout her pregnancy, first brandy and then beer. Tr. Feb. 16, 2006, 10:17-11:14. In fact, she even named Ms. Holmes "Brandy" after her favorite drink. Tr. Feb. 16, 2006, 11:22-31.

Evidence presented at trial depicted Ms. Holmes as possessing facial features, a growth deficiency and deficits in cognitive and adaptive functioning, consistent with FAS. Tr. Feb. 16, 2006, 87:28-88:16. That her face exhibited FAS-related features was evident as she appeared sitting in the courtroom as a young adult. Tr. Feb. 16, 2006, 31:14-17. Expert testimony also documented Ms. Holmes' organic brain damage, deficits in her cognitive and adaptive functioning, and a mental health profile, all representative of FAS. Tr. Feb. 16, 2006, 30:20-28, 59:14-16, 60:18-19.

Most individuals with prenatal alcohol exposure are not mentally retarded within the accepted definition of that term, but they do typically fall well below the average range of intellectual functioning.[6] Moreover, deficits in adaptive functioning have been found to be more profound in individuals with FAS than deficits associated with IQ or other measures of academic performance.[7] As is typical of individuals

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[6] Blair Paley & Mary J. O'Connor, *Neurocognitive and Neurobehavioral Impairments in Individuals With Fetal Alcohol Spectrum Disorder: Recognition and Assessment*, 6 Int. J. Disabil. Hum. Dev. 127 142 (2007), at 129.

[7] Ann Streissguth, *The Importance of Adaptive Behavior Assessments for Understanding Fetal Alcohol Spectrum Disorders*

with FAS, Ms. Holmes has an IQ of 77, which is much lower than average. In school she was classified as learning disabled and speech impaired, with particular problems in reading, math, and communication. R. 674-695 (Caddo Parish School Board, school records). Her impairments included difficulties with both "visual and auditory processing and visual-motor integration." *Id.* Experts noted that she is "functioning . . . at the very lowest level of borderline intellectual ability." Tr. Feb. 16, 2006, 51:5-6.

To fully assess Ms. Holmes' FAS, her organic brain damage must be reviewed. Researchers studying the teratogenicity of ethanol, that is, the ability of ethanol (alcohol) to induce malformations in the developing fetus, have found that ethanol readily crosses the placenta and that blood alcohol levels in the fetus *equal those of the mother within minutes*, resulting in a reduction in brain cell growth and increased cell death.[8]

Clinical evaluation of Ms. Holmes' December 2005 and January 2006 brain imaging studies revealed abnormalities in the parts of the brain that ". . . are generally consistent with Fetal Alcohol Syndrome." R. 3683 (Expert Report). Particularly important are the brain anomalies in Ms. Holmes' cerebellum and basal ganglia that are associated with FAS.[9] The

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(FASD), 32 Psych. in Mental Retardation and Dev. Disabil. 5-6 (Fall 2006) at 6.

[8] Larry Burd, et al., *Recognition and Management of Fetal Alcohol Syndrome*, 25 Neurotoxicology and Teratology 681-688 (2003), at 682.

[9] Albert E. Chudley, et al., *Challenges of Diagnosis in Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in the Adult*, 145C Amer. J. Med. Genetics, Part C, 261-272 (2007), at 267.

basal ganglia contain the brain circuitry necessary for higher cognitive functioning, including the inhibition of inappropriate behavior.[10] Taken together, abnormalities in these areas of the brain are associated with FAS and FAS, in turn, is associated with deficits in a set of adaptive behaviors.[11] Adaptive behavior or "adaptive functioning" is "the collection of conceptual, social and practical skills that have been learned by people to function in their everyday lives."[12] There are also well-documented deficits in adaptive functioning, characteristic of individuals with FAS, that are particularly relevant to Ms. Holmes' ability to understand the consequences of her actions and to show remorse. Manifestations of her disability are evident in her background, social history and the trial record. As one expert noted, "she has a history of abnormal behavior all of her life." Tr. Feb. 16, 2006, 60:18-19.

The National Center on Birth Defects and Developmental Disabilities considers adaptive functioning deficits related to FAS to be present when there are limitations in *three or more* functional domains:

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[10] Paley & O'Connor, *supra* note 6.

[11] Researchers also note that changes in the corpus callosum are associated with FAS, although changes in the corpus callosum were not detected in Ms. Holmes' MRI and PET scans. Radiologists at the University of Washington have developed special MRI programming designed to focus in more detail on the corpus callosum, a procedure that was not performed during Ms. Holmes's MRI scan. *See* Fred L. Bookstein et al., *Geometric Morphometrics of Corpus Callosum and Subcortical Structures in the Fetal-Alcohol-Affected Brain*, 64 Teratology 4-32 (2001) at 6.

[12] Marc J. Tasse, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 App. Neuropsychology 114-123 (2009), at 114.

(1) cognitive deficits; (2) executive functioning deficits; (3) motor function delays; (4) attention and hyperactivity problems; and (5) social skills problems.[13] Ms. Holmes has adaptive behavior deficits in *at least three* of these areas: cognitive, executive functioning and social skills. Tr. Feb. 16, 2006, 82:14 – 88:16. Ms. Holmes' neuropsychological test results also reflected brain damage for three of five major indices of neuropsychological dysfunction that showed the effects of her organic brain damage. Tr. Feb. 16, 2006, 29:27-31:6.

Ms. Holmes' cognitive deficits have been well documented. Her executive functioning and social skills deficits align with what researchers have summarized as the profile of individuals with FAS: "poor social judgment, trouble learning from experience, failure to consider the consequences of their actions, difficulty understanding social cues, indiscriminate social behavior and difficulty communicating in social contexts."[14] Research indicates that the social skills of children with FAS increasingly fall behind those of same-age peers as they develop and that by adulthood they are reported to have significant deficits in their social abilities.[15] Recent studies also suggest that moral development remains immature in individuals with FAS.[16]

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[13] National Center on Birth Defects and Developmental Disabilities, *supra* note 2, at 14-16.

[14] Amy Schonfeld, et al., *Moral Maturity and Delinquency After Prenatal Alcohol Exposure*, J of Studies on Alcohol, 545-554 (July 2005).

[15] Ann Streissguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 Jour. Amer. Med. Ass'n 1961-67 (1991).

[16] Schonfeld, *supra* note 14.

Unrebutted testimony documented extensive evidence of Ms. Holmes' deficits in executive functioning, including poor organization, planning or strategy use, lack of inhibition, difficulty grasping cause and effect, and poor judgment. There also is evidence that Ms. Holmes had social skill problems, including being easily taken advantage of and difficulties understanding the perspective of others. Expert testimony was presented demonstrating that Ms. Holmes does not reason or foresee consequences like a normal adult. Tr. Feb. 16, 2006, 67:7-10. Ms. Holmes has a history of poor judgment and poor impulse control, as well as a juvenile and adult criminal history documenting a failure to conform to social norms. Her trouble with the law is a direct consequence of her impaired executive functioning, inability to conform to social norms and difficulty learning from past experience, all of which are characteristic of FAS.[17]

Individuals with FAS also have a high risk of mental health problems.[18] Ms. Holmes "has had multiple psychiatric diagnoses in the past, including various mood and anxiety disorders, learning disorders, conduct disorder, oppositional defiant disorder, and substance abuse." R. 3683 (Expert Report). In addition to major depression, Ms. Holmes dependency on alcohol and marijuana is also noted in the record. Tr. Feb. 16, 2006, 50: 7-14. Ms. Holmes has been diagnosed with depression, impulse control impairment, antisocial personality disorder and has a "long, long, long history of mental illness." Tr. Feb.

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[17] Chudley, *supra* note 9, at 268 (finding fetal alcohol disorders predictive of high risk for crimes, varying from theft to murder).

[18] *Id.* at 268.

16, 2006, 59: 14-16. "Considering her long legal history, diagnosis of conduct disorder and oppositional defiant disorder, an inability to appreciate the long term consequences of immediate actions would be predicted, and indeed, is a feature of Fetal Alcohol Syndrome." R. 3683 (Expert Report).

Conry and Fast's widely cited work found that fetal alcohol-related disorders are predictive of high risk for crime, varying from thefts to murder.[19] They found that individuals with FAS have problems in adaptive functioning, language, attention, reasoning and memory.[20] For example, individuals with FAS may have gaps in memory due to organic brain damage that make them prone to fill in missing memories with inaccurate details.[21] During legal proceedings, an individual with FAS may give a false confession or make a false statement and may not clearly remember details of time, place and sequence.[22] Evidence of all of these traits, associated with FAS, was presented at trial regarding Ms. Holmes' memory gaps and false or misleading statements to investigators.

The Louisiana Supreme Court had before it ample evidence in the record that Ms. Holmes has FAS, which resulted in organic brain damage, cognitive and adaptive functioning deficits (including executive functioning deficits and deficits in social skills), and

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[19] *Id.* (notably, trouble with the law started at a mean age of 12.8 years).

[20] J. Conry and D.K. Fast, *Fetal Alcohol Syndrome and the Criminal Justice System, The Law Foundation of British Columbia*, (2000).

[21] *Id.* at 3.

[22] *Id.* at 3.

mental health problems. The record before the Louisiana Supreme Court also demonstrates that these problems and deficits, resulting from her exposure to alcohol throughout her fetal development, had lifelong implications for her. Yet, the Louisiana Supreme Court did not consider any of this as mitigating circumstances in determining whether Ms. Holmes' death sentence is appropriate.

B. The Louisiana Supreme Court Failed To Adequately Consider Ms. Holmes' Disabilities Caused By Fetal Alcohol Syndrome, In Conjunction With Her Low IQ, When Determining Whether Her Death Sentence Is Appropriate.

In *Atkins v. Virginia,* 536 U.S. 304 (2002), this Court addressed the inappropriate application of the death penalty to vulnerable populations. Atkins suffered from severe disabilities in the areas of reasoning, judgment, and control of impulses, which are the same disabilities found in the instant case. Like Atkins, Ms. Holmes' mental deficiencies "do not warrant an exemption from criminal sanctions, but diminish [her] personal culpability." *Id.* at 320. Specifically, Ms. Holmes suffers from certain characteristics of mental retardation that this Court expressly found significant in *Atkins*: "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id.* at 317-318. The *Atkins* Court held that the execution of a person with such characteristics would "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Id.* Although Ms. Holmes does not have an

IQ that would classify her as "mentally retarded," she exhibits the same type of diminished capacity and culpability due to FAS as does the person with mental retardation addressed in *Atkins*.

A brief review of *Atkins* is necessary to conduct a proper analysis of Ms. Holmes' case: Mr. Atkins was twice sentenced to the death penalty stemming from an ATM robbery. *Id.* at 308-310. In the first sentencing phase, the defense called a psychologist, who testified that Atkins was "mildly mentally retarded," with an IQ of 59. That sentence was set aside for reasons not relevant to the case at bar. At the rehearing for sentencing, the state called a rebuttal witness who testified that Mr. Atkins was not retarded, that he was "of average intelligence, at least," and that the appropriate diagnosis was antisocial personality disorder. The jury again sentenced Akins to death, and this sentence was affirmed by the Virginia Supreme Court. It is of particular note that a dissent at the State Supreme Court level argued that the imposition of the death sentence on one "with the mental age of a child between the ages of 9 and 12 [was] excessive," and that the state's expert's testimony was "incredulous as a matter of law." *Id.* This Court ultimately agreed with the dissent and reversed Mr. Atkins' death sentence. Notably, in this case, testing indicated that Ms. Holmes was functioning in the 4th-7th grade level academically and intellectually, and that Ms. Holmes functions like a 10-12 year-old. *See* Tr. Nov. 10. 2005, 21:3-4; Tr. Nov. 10, 2005, 37:14-18.

In *Atkins*, this Court held that mental retardation involves "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction

that became manifest before age 18." 536 U.S. at 317-318. In *Atkins*, this Court further determined that an IQ of 75 is "typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309. In doing so, this Court tried to draw a line of what "shocks the conscience" in a capital case involving a person with mental retardation. The concept of FAS has never undergone this type of analysis, although individuals with FAS lack the intellectual and adaptive functioning necessary to justify their execution.

In *Atkins*, this Court addressed the drastic change in society's view of the execution of the mentally retarded. At the time of this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), only two states had banned the execution of persons with mental retardation. In the thirteen years from *Penry* to *Atkins*, the federal government and at least sixteen additional states had banned the execution of mentally retarded individuals, leading this Court to the following conclusion:

> It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that

> have addressed the issue have voted overwhelmingly in favor of the prohibition. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

Atkins, 536 U.S. at 315-316. With respect to FAS, those who suffer from it also may be "so impaired as to fall within the range of . . . offenders about whom there is a national consensus." *Id.* at 309.

Here, Ms. Holmes suffers from a myriad of cognitive and adaptive functioning deficits as well as mental health issues, organic brain damage, significant brain dysfunction in several areas, learning disabilities, alcohol and drug dependence, and borderline mentally retarded intellectual functioning. Prior to trial and at trial, a psychiatrist testified that Ms. Holmes suffers from FAS. Moreover, the prosecution conceded Ms. Holmes suffers from FAS. Neuropsychological testing revealed that Ms. Holmes has a moderate degree of organic brain dysfunction, primarily to the left side of her brain. There was further testimony that a pre-trial MRI and PET Scan revealed significant abnormalities in several areas of her brain, all consistent with FAS. Every expert that evaluated Ms. Holmes placed her intellectual functioning at the borderline mentally retarded level with a full scale IQ in the 74 - 77 range. Despite the trial record's clear showing that Ms. Holmes suffers from FAS and has a low IQ, she was still sentenced to death because such facts were characterized by the prosecution as aggravating evidence, and the Louisiana Supreme Court failed to consider that evidence during its proportionality review.

Courts have recognized the substantial impact of FAS when viewed as a mitigating factor. In *State v.*

Haberstroh, 119 Nev. 173 (2003), the Nevada Supreme Court held that it was prejudicial error to exclude certain mitigating evidence, including evidence that the defendant suffered from fetal alcohol syndrome, mild neuropsychological impairment, and a low average IQ. *See also, Castro v. Oklahoma,* 71 F.3d 1502, 1516 (10th Cir. 1995) ("We conclude that the facts and circumstances of [defendant's] crime, coupled with a more complete picture of his mental health, [including FAS], likely would have changed the jury's intuitive calculus.").

Most states permit proof of intoxication or other conditions to show a lack of specific criminal intent. In *Dillbeck v. State*, 643 So.2d 1027 (Fla. 1994), the court made clear that the disabilities caused by FAS, unlike those resulting from intoxication, are beyond the capacity of the affected individual to prevent:

> Evidence concerning alcohol-related conditions has long been admissible during the guilt phase of criminal proceedings to show lack of specific intent. . . Just as the harmful effect of alcohol on the mature brain of an adult imbiber is a matter within the common understanding, so too is the detrimental effect of this intoxicant on the delicate, evolving brain of a fetus held in utero. As with 'epilepsy, infancy, or senility,' . . . we can envision few things more certainly beyond one's control than the drinking habits of a parent prior to one's birth. We perceive no significant legal distinction between the condition of epilepsy . . . and that of alcohol-related brain damage in issue here—both are specific, commonly recognized conditions that are beyond one's control.

Id. at 1028-1029. *See also, State v. Rose,* 339 N.C. 172 (1994) (holding that FAS arises from circumstances

entirely beyond the individual's control). Although Ms. Holmes' prenatal exposure to alcohol, at fetal blood levels equal to that of her intoxicated mother, was likewise beyond her capacity to prevent, she now suffers the lifelong aftereffects of that maternal intoxication. Due to FAS, Ms. Holmes does not have the capacity to appreciate the criminality of her conduct or to conform her actions to the requirements of the law.

Significantly, the dissenting opinion in the Louisiana Supreme Court addressed evidence demonstrating that Ms. Holmes was mentally retarded under Louisiana law, and found it "error to relegate to post-conviction relief the pivotal issue of whether the defendant is mentally retarded and thus exempt from execution. . ." The dissent highlights the error committed by the Louisiana Supreme Court in failing to consider FAS in its proportionality review. If the Louisiana Supreme Court had considered FAS during its proportionality review, it would have recognized that the death penalty, in this case, does not serve a legitimate societal purpose.

As this Court explained in *Atkins*, retribution and deterrence are the only two social purposes that justify the imposition of the death penalty: "Unless the imposition of the death penalty. . . 'measurably contributes to one or both of these goals [of retribution and deterrence], it is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 319. (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982). Looking to the characteristic disabilities of persons with mental retardation, the Court concluded that "the lesser culpability of the mentally retarded offender surely does not merit

[death as] retribution." *Id.* In *Atkins*, this Court likewise found that the purpose of deterrence would not be served by executing the mentally retarded given that their very limitations preclude thoughtful behavior in response to the law that those guilty of the most depraved murders will be sentenced to death. *Id.* at 319-320. Further, in *Penry*, Justice Brennan (for himself and Justice Marshall), in partial dissent, argued that the execution of an individual with mental retardation neither furthers the punishment aims of deterrence nor of retribution. Since such individuals lack the requisite culpability, execution can never be a 'just desert' for a retarded offender." *Penry*, 492 U.S. at 348 (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982). Here, because of FAS, the execution of Ms. Holmes would fail to serve any legitimate societal purpose. Neither the goal of retribution nor of deterrence would be served by her execution.

This Court also noted in *Atkins* that the exemption of the mentally retarded from execution serves other legitimate ends of the criminal justice system – due process and the enhanced reliability necessary in capital sentencing proceedings:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defen-

dants in the aggregate face a special risk of wrongful execution.

Id. at 320-21 (citing *Penry v. Lynaugh*, 492 U.S. at 323-25 (internal citations omitted)). In Ms. Holmes' case, both experts testified as to the limitations in her ability to give meaningful assistance to counsel, to testify, and the risk that her demeanor would be interpreted as a lack of remorse. Tr. Nov. 10, 2005, 55:13–29. As such, no legitimate social goals will be met by the execution of Ms. Holmes.

C. The Portrayal Of The Behavioral Manifestations Of Fetal Alcohol Syndrome As Aggravating Circumstances Precluded A Consideration Of Fetal Alcohol Syndrome As A Mitigating Circumstance In Determining Whether Ms. Holmes' Death Sentence Is Appropriate.

Ms. Holmes' behavioral characteristics, such as violence, lack of empathy, and inability to care are classic manifestations of FAS. Her diagnosis of FAS is an explanation that the Louisiana Supreme Court should have taken into account as a mitigating circumstance in its review of her death sentence. The National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention (CDC), states that the deficits in executive functioning and social skills of individuals with FAS "*demand* that when they do encounter the justice system, their deficits should be taken into account during all aspects of justice proceedings (*i.e.*, charges, process, punishment, and rehabilitation."[23] This is

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[23] National Center on Birth Defects and Developmental Disabilities, Centers for Disease Control and Prevention, *supra* note 2, at 27 (emphasis added).

precisely what the Louisiana Supreme Court did not do in its review of Ms. Holmes' death sentence. The trial court allowed the State to manipulate these disabilities into aggravating factors, thus creating an impossible hurdle for Ms. Holmes to overcome, as this Court feared would happen to those with disabilities in the areas of reasoning, judgment, and impulse control. *See Atkins*, 536 U.S. at 304. The record is replete with examples of the State's exploitation of Ms. Holmes' disabilities.

Thus, in the State's closing argument during the sentencing phase, the prosecutor, Mr. O'Callaghan, while admitting that Ms. Holmes' mother drank alcohol while pregnant, stated that this is "not only not an excuse, it doesn't mitigate anything." Tr. Feb. 16, 2006, 152: 17-18. Similarly, during the trial and sentencing phases, the State made much of Ms. Holmes' apparent lack of remorse for her actions, thereby misconstruing the fact that individuals with FAS are often unable to make connections between cause and effect, anticipate consequences or fully comprehend another person's perspective. Thus, the prosecutor undercut the testimony of one FAS expert by misconstruing Ms. Holmes' FAS disabilities as aggravating factors:

> So what does Dr. Vigan's testimony ultimately mean? It means that in deciding whether or not Brandy Holmes deserves to receive the death penalty, you should consider that she is violent, that she is deceitful, that she tries to stay outside of the rules and opposes any authority above her. That is what you should consider from Dr. Vigan's testimony.

Id. at 154:15-20. Further presenting Ms. Holmes' deficits in adaptive functioning as aggravating,

Mr. O'Callaghan stated: "What you've heard is that she's always hurt other people, that she doesn't have empathy, that she doesn't care for others." *Id.* at 158: 22-24. The State's presentation of these factors as aggravating, the trial court's failure to prevent this prejudice by giving a proper charge to the jury, and the Louisiana Supreme Court's failure to consider this issue, all violate the policy underlying this Court's decision in *Atkins*.

The trial court, as well as the Louisiana Supreme Court, disregarded the fact that this failure to understand cause and effect, known to be associated with FAS, may explain Ms. Holmes' inability to express remorse. This issue should have been presented in a fair and just manner to the jury but it was not, and the Louisiana Supreme Court failed to address this failure in its proportionality review.

Finally, all defense challenges to potential jurors on the grounds that the juror would not consider FAS as a mitigating factor were denied by the trial court. However, at least one potential juror was excused for cause "[b]ecause in my mind just from observing, looks like to me there might be a lack of capacity for that particular defendant." R. 5262. Thus, the defense was stymied in its efforts to present FAS as a mitigating factor.

Most critically, the Louisiana Supreme Court's failure to recognize, or even discuss this issue in its proportionality review on appeal prevented Ms. Holmes from obtaining a just and equitable review of her death sentence. Therefore, this Court's review is imperative to ensure that Ms. Holmes does not fall into the trap Justice Stevens feared in *Atkins* where she is cut in the criminal justice system by the double-edged sword. 536 U.S. at 321.

CONCLUSION

Ms. Holmes death sentence is a prime example of jeopardizing the reliability and fairness of capital proceedings, a result this Court sought to avoid in *Atkins*. Ms. Holmes' significant impairments in reasoning, judgment, and impulse control, attributable to FAS and her low IQ, render her death sentence cruel and unusual punishment. Therefore, this Court should accept the petition for a writ of certiorari to review the Louisiana Supreme Court's judgment in this case.

Respectfully submitted,

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